(16,671.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 458.

THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 In the Supreme Court of the Territory of New Mexico.

Be it remembered that heretofore, to wit, on the 9th day of July, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record; which said record is in the words and figures following, to wit:

Transcript of Record.

In the Supreme Court of New Mexico, July Term, 1897.

TERRITORY OF NEW MEXICO, Appellant, *vs.* UNITED STATES TRUST COMPANY OF NEW YORK and Charles A. Smith, Receiver of Atlantic and Pacific Railroad Company.	No. 733.

Appeal from second judicial district.

Filed in my office this Jul- 9th, 1897.

GEO. L. WYLLYS, *Clerk.*

2 Be it remembered that heretofore, to wit: on the 16th day of July, 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States a bill of complaint which said bill of complaint is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant, *against* ATLANTIC AND PACIFIC RAILROAD COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company, and The Boston Safe Deposit and Trust Company, Defendants.	In Equity.

3 *Bill of Complaint.*

To the Honorable Needham C. Collier, judge of the district court of the second judicial district of the Territory of New Mexico:

Your orator United States Trust Company of New York, a corpo-

ration duly created by and under the laws of the State of New York and a citizen of the said State, having its principal office and place of abode in the city of New York, brings this, its bill, by leave of the court first had and obtained, against Atlantic and Pacific Railroad Company, a corporation created, organized and existing under and by virtue of the laws of the United States of America, and having its principal office and place of abode at Albuquerque, in the Territory of New Mexico; the Atchison, Topeka and Santa Fe Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the Territory and State of Kansas, and having its principal office and place of abode in and being a citizen and resident of said State; the St. Louis and San Francisco Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and having its principal office and place of abode in and being a citizen and resident of the said State; Aldace F. Walker, as receiver, a citizen of the State of Illinois, and having his place of abode at Chicago, in said State; John J. McCook, as receiver, a citizen of the State of New York, and having his place of abode in the city of New York, in the said State; Joseph C. Wilson, as receiver, a citizen of the State of Kansas, and having his place of abode at Topeka, said State; the Mercantile Trust Company, a corporation duly created, organized and existing under and by virtue of the laws of the State
4 of New York, and a citizen of said State, having its principal office and place of abode in the city of New York, in said State; and the Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the State of Massachusetts, and a citizen of said State, having its principal office and place of abode at Boston, in said State; and thereupon your orator complains and says:

First. Your orator is a corporation, bearing the corporate name of United States Trust Company of New York, duly created and existing under the laws of the State of New York, and is a citizen of said State, and has its principal office and place of business in the city of New York, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter described.

Second. That the defendant, Atlantic and Pacific Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the United States of America, to wit, an act of Congress approved July 27, 1866, being a public act to which your orator prays leave to refer as a part of this bill, as fully as though incorporated in the body thereof; and the acts of Congress supplementary thereto and amendatory thereof, including particularly an act approved April 20, 1871, to which your orator prays leave to refer as part of this bill, as fully as though incorporated in the body thereof.

Third. That the defendant, Atlantic and Pacific Railroad Company, duly complied with the provisions of said acts of Congress, and became and was thereby duly authorized and empowered to

and did thereafter construct or acquire by purchase or lease,
5 and operate and maintain the railroads and other property hereinafter mentioned.

Fourth. That in order to secure the bonds to be issued by it, said defendant Atlantic and Pacific Railroad Company, on or about the 1st day of July, 1880, being thereunto by law in all respects duly authorized, and due corporate action having been had, made, executed and delivered to your orator as trustee a certain mortgage or deed of trust called the Western Division first mortgage of said defendant, bearing date the 1st day of July, 1880, in and by which it conveyed to your orator as trustee all and singular its railway and property, real, personal and mixed, and all franchises of every kind or description and wheresoever situated, then or thereafter composing or pertaining to that part of the railroad and telegraph line of said defendant known as the Western division, by the following description (the words "party of the first part," referring to said defendant, and the words "party of the second part," referring to your orator,) to wit:

"The franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route
to the Colorado river, at such point as may be selected by
6 the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging, or in anywise appertaining, and also all the estate right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the party of the first part of, in and to the same, and any and every part thereof, with the appurtenances."

That since the execution of said Western Division first mortgage said defendant Atlantic and Pacific Railroad Company has acquired a large amount of railroad, engines, cars and other equipment and other personal property, and a large amount of real estate and interests in and rights to real estate, all of which became and are subject to the lien of said mortgage, and the said mortgage is and remains a valid and subsisting lien upon all the property described therein, and upon said subsequently acquired property, and upon all the property, rights and franchises granted to and conferred upon the said Atlantic and Pacific Railroad Company by the acts

of Congress hereinbefore mentioned or subsequently acquired thereunder.

Fifth. That being thereunto by law in all respects duly authorized, and due corporate action having been had, and under and in accordance with the provisions of said Western Division first mortgage, said defendant Atlantic and Pacific Railroad Company, on and subsequently to said 1st day of July, 1880, made, exe-
7 cuted and delivered its bonds, all bearing date on that day, to an amount not exceeding $25,000 a mile, and amounting in the aggregate to $16,000,000, as follows, viz:

(*a.*) 15,950 coupon bonds, each for the sum of $1,000, amounting in the aggregate to $15,950,000, in and by each of which bonds the said defendant Atlantic and Pacific Railroad Company promised to pay to your orator, as trustee, or to the bearer thereof on the 1st day of July, 1910, at the agency of the railroad company in the city of New York, the sum of $1,000 in gold coin of the United States of America, and also to pay interest thereon at the rate of six per cent. per annum in like gold coin semi-annually on the first days of January and July in each year, at the agency of said company in the city of New York, on presentation as they severally became due of coupons for such interest annexed to said bonds and payable to bearer.

(*b.*) Ten registered bonds each for the sum of $5,000, and amounting in the aggregate to $50,000, in and by each of which bonds the said defendant, Atlantic and Pacific Railroad Company, promised to pay to your orator, as trustee, or to the registered holder thereof, the sum of $5,000 on the 1st day of July, 1910, in gold coin of the United States of America, at the agency of the railroad company in the city of New York, and also to pay interest thereon at the rate of six per cent. per annum in like gold coin semi annually on the first days of January and July in each year, at the agency of the railroad company in the city of New York.

Sixth. That all of said bonds, amounting in the aggregate to $16,000,000 of principal, were duly issued by said defendant, Atlantic and Pacific Railroad Company, and authenticated by the
8 certificate thereon signed by your orator in accordance with the provisions of said bonds and of said Western Division first mortgage or deed of trust, and were duly negotiated and delivered for value prior to the defaults hereinafter mentioned; and all of said bonds are now outstanding and are valid obligations of said defendant, Atlantic and Pacific Railroad Company. That a true copy of said Western Division first mortgage, dated July 1, 1880, in which are set forth true copies of said coupon bonds and of said registered bonds, is hereto annexed marked "Exhibit A," and your orator prays that the same may be taken as part of this bill of complaint as fully as though incorporated in the body thereof.

Seventh. That prior to the making and issue of the said Western Division first mortgage six per cent. bonds, the defendants, Atchison, Topeka and Santa Fe Railroad Company, and St. Louis and San Francisco Railway Company, acquired the control of the defendant Atlantic and Pacific Railroad Company, through the pur-

chase and ownership of a majority of its capital stock; that the said bonds were issued and disposed of for the purpose of completing the line of railroad of the Atlantic and Pacific Railroad Company, known as its Western division, from Albuquerque, on the Rio Grande river, in the Territory of New Mexico, to The Needles, on the Colorado river, on the boundary of the State of California, in order to form, with the railroads of the said Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company a through line to the Pacific coast, and that for good and valuable considerations, as additional security for the payment of the principal and interest of the said bonds, the said Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway
9 Company on the 1st day of July, A. D. 1880, made and executed an agreement whereby they severally covenanted and agreed with the Atlantic and Pacific Railroad Company and your orator, as trustee of said mortgage, that if the earnings from the said Western division should prove insufficient to pay all coupons on said bonds as they matured, they would contribute ratably for the purpose of paying and cancelling the same, such sum as might be necessary for the purpose, from their respective earnings upon all business arising from and delivered to said Western division, not exceeding twenty-five per cent. of the gross amount of their said described earnings. That a copy of said agreement of guaranty is hereto annexed marked "Exhibit B," and your orator prays that the same may be taken as a part of this bill of complaint, with the same effect as if fully incorporated in the body thereof.

Eighth. That on or about the 1st day of October, 1880, the said defendant Atlantic and Pacific Railroad Company made, executed and delivered to the said defendant, The Boston Safe Deposit and Trust Company, as trustee, a certain mortgage, or deed of trust, known as its income mortgage, bearing date on that day, in and by which it agreed with the said trustee to make up and furnish to said trustee from time to time a fair and just account of payments and expenses and gross and net earnings of said Western division for the six months ending on each first day of January and July in each year, so as to exhibit the true sum applicable to the payment of interest on the income bonds referred to in said trust deed, and to pay the said interest or so much thereof as has been earned on the first days of April and October in each year. That the said in-
10 denture was made for the purpose of securing the payment of the principal and interest of bonds to be issued under the said indenture to an amount not exceeding $18,750 a mile of completed road, and that, as your orator is informed and believes, such income bonds have been issued thereunder and are now outstanding to an amount in the aggregate of $12,000,000. But your orator charges that the lien and obligation of the said bonds against the defendant Atlantic and Pacific Railroad Company and its property, if any, are inferior and subordinate to the lien and obligation of the bonds secured by the said Western division first mortgage.

Ninth. That on or about the first day of September, 1887, the said

defendant Atlantic and Pacific Railroad Company, made, executed and delivered unto the defendant, The Mercantile Trust Company, its certain second mortgage or deed of trust upon the said Western division, bearing date on that day, in and by which it conveyed to the said Mercantile Trust Company, as trustee, the property in said mortgage described, being the same property previously conveyed by the said Western division first mortgage as hereinbefore described. That the said mortgage was made to secure the due payment of the principal and interest of bonds known as second-mortgage six per cent. guaranteed gold bonds of the Atlantic and Pacific Railroad Company, Western division, limited to $10,000 a mile of completed railroad of the Western division of said railroad company, to be guaranteed severally, but not jointly, as to the payment of one-half of the principal and interest by the Atchison, Topeka and Santa Fe Railroad Company and as to the payment of one-half of the principal and interest by the St. Louis and San Francisco Railway Company, which said last-named two companies
11 joined in the execution of the mortgage above set forth as guarantors of the payment of said principal and interest; which said bonds were each for the principal sum of $1,000, payable on the 1st day of September, 1907, and to bear interest at the rate of six per cent. per annum, payable semi-annually on the first days of March and September in each year, at the agency of said railroad company in the city of New York.

That of the bonds authorized to be issued under and to be secured by said mortgage or deed of trust, the defendant Atlantic and Pacific Railroad Company has made and issued, as your orator is informed and believes, second-mortgage six per cent. guaranteed gold bonds for the principal sum of $5,600,000, of which, $5,500,000 are now actually outstanding, and all, or the greater part of which, were taken by the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company as security for, or in payment of, debts claimed to be due to them from the Atlantic and Pacific Railroad Company, and such bonds are now held by them. That the lien and claim of the said second-mortgage six per cent. guaranteed gold bonds upon the railroad and property of the defendant Atlantic and Pacific Railroad Company, if any, are expressly subject, subordinate and inferior to the lien of the Western Division first mortgage hereinbefore referred to.

Tenth. That on each of the first days of January and July, 1894, and January and July, 1895, the holders of said Western Division first-mortgage six per cent. bonds to the amount of $16,000,000, were entitled to collect and receive from said defendant Atlantic and Pacific Railroad Company, the interest falling due on said
12 bonds on each of said first days of January and July in each of said years respectively, being the semi-annual installments of interest due on each of said bonds on said dates; but the said defendant Atlantic and Pacific Railroad Company made default in the payment of said interest; and said semi-annual installments of interest falling due on the said dates respectfully, to-

gether with certain interest previously due on said bonds, remain wholly due and unpaid.

Eleventh. That on or about the 30th day of December, 1893, the defendant, The Mercantile Trust Company, filed in this court its bill of complaint against the said defendant Atlantic and Pacific Railroad Company, and therein set forth, among other things, that the said complainant was the trustee under the second mortgage upon the Western division of said company hereinbefore mentioned; that in and by said mortgage the said defendant Atlantic and Pacific Railroad Company agreed, among other things, promptly to pay all takes and assessments upon the premises conveyed thereby, but that the said company had wholly failed to keep and perform its said covenants, and that there were then due large amounts of unpaid taxes in the Territories of Arizona and New Mexico; that the said complainant had duly demanded that the said railroad company should keep and perform its said covenants, but that the said railroad company had wholly failed and refused to comply with such demand; and the said complainant in said cause further showed that the defendant Atlantic and Pacific Railroad Company was wholly and totally insolvent and unable to meet its existing and presently accruing obligations, and that the interests of the holders of the second-mortgage bonds secured by said mortgage were seriously imperiled thereby, and unless accorded judicial pro-
13 tection would be wholly lost, to the great detriment and damage of said bondholders.

That upon the filing of said bill such proceedings were thereupon had, that on January 4, A. D. 1894, the Honorable Needham C. Collier, a judge of this court, made an order appointing Joseph W. Reinhart, John J. McCook and Joseph C. Wilson, receivers, as in said bill prayed, of all and singular the lands, tenements and hereditaments of the defendant Atlantic and Pacific Railroad Company covered by the said second mortgage, which order was duly filed in said cause on said 4th day of January, 1894. That, as your orator is informed and believes, the said Joseph W. Reinhart, John J. McCook and Joseph C. Wilson filed their bonds and qualified as such receivers and entered into possession of all the real estate and property of the Western division of said defendant railroad company and continued in such possession until the 23rd day of August, 1894 on which date the said Joseph W. Reinhart resigned as such receiver, and by an order made and entered in said cause on or about that day, Aldace F. Walker was appointed receiver in his place and duly filed his bond and qualified as such receiver and entered into possession of the said railroad and property as coreceiver with said John J. McCook and Joseph C. Wilson; and from and after said date said Aldace F. Walker, John J. McCook and Joseph C. Wilson, as such receivers, have had and now have the actual possession, custody and control of all the property known as the Western division of the said railroad company covered by the said second mortgage and being the same property covered by and included in the said Western Division first mortgage to your orator as

aforesaid; and, by reason of the fact that this court
14 has, by the appointment of such receivers, taken into its custody and possession all of said mortgaged property situated within the jurisdiction of this court, your orator believes that it cannot proceed to adequately enforce the security provided in and by the said mortgage in any other court, and your orator is without remedy save in this court. That by an amended and supplemental bill of complaint, heretofore filed in said cause, your orator has been made a party defendant thereto for the sole avowed purpose of ascertaining the amount due on said first-mortgage bonds. Your orator prays leave to refer to the said bill of complaint of The Mercantile Trust Company, and to the order appointing said receivers, and to all other acts and proceedings in said cause on file in this court, as part of this, your orator's bill of complaint, with the same effect as if fully incorporated in the body thereof.

Twelfth. And your orator further shows that the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company have wholly made default in the fulfillment of their agreement hereinbefore mentioned to contribute to the extent of twenty-five per cent. of their earnings from business interchanged with the Atlantic and Pacific Railroad Company toward the payment of the interest upon the said first-mortgage bonds, and that the receivers of property and franchises of said two companies, who were also appointed receivers of the railroads and property of the defendant Atlantic and Pacific Railroad Company, have likewise wholly failed to fulfill and carry out the said agreement.

That there are important and nice questions in dispute between
15 said three railroad companies and their respective receivers, growing out of various contracts for the operation of said Atlantic and Pacific railroad and the payment of its bonded and guaranteed debt, and that, as your orator is advised and believes, it is not practicable for the receivers of said Atchison, Topeka and Santa Fe railroad and said St. Louis and San Francisco railway to adequately assert and protect the interests of said Atlantic and Pacific first-mortgage bondholders.

Thirteenth. And your orator further shows that the said defendant Atlantic and Pacific Railroad Company is hopelessly insolvent and unable to pay its indebtedness now outstanding to a large amount, including the overdue interest upon its first-mortgage bonds hereinbefore mentioned, and that the said defendant railroad company cannot secure the means of paying the said overdue obligations; and that it is necessary for the protection of the holders of said bonds issued under said Western Division first mortgage, that the property of said railroad company should be sold without delay. That the property and premises covered by the said first mortgage so made to your orator as aforesaid, are and constitute very inadequate security for the payment of the amounts due on the said bonds, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under

your orator's trust, and all persons interested in the property of said defendant railroad company.

Fourteenth. That default has been made in the payment of interest upon all of said first-mortgage bonds and such default has continued during more than six consecutive months; that the holders of the entire amount of the bonds secured by the said first mortgage, have joined in a demand requiring your orator, as
16 trustee under said mortgage or deed of trust, to file this bill and have concurred in the application for a decree for the foreclosure of said mortgage and the sale of the mortgaged premises, and for the appointment in the meantime of a receiver thereof; that the holders of all of said bonds have likewise united in a declaration electing that the principal of the said bonds shall be considered due, and that by reason of the facts hereinbefore alleged, the whole amount of the principal of said bonds, as well as all interest due thereon, as hereinbefore mentioned, is now due and payable, and that your orator is entitled to apply to this court for the foreclosure and sale of the premises covered by the said first mortgage, and for the appointment in the meantime of a receiver of said mortgaged premises in the interest of said first-mortgage bondholders.

Fifteenth. That no proceedings have been had at law or in equity for the collection of said mortgage debt or any part thereof.

In consequence of the embarrassed condition of the financial affairs of the defendant railroad company and on account of the many difficulties which are manifestly, from the allegations hereinbefore contained, involved in the execution of your orator's said trust, it is impossible for your orator, as trustee under said first mortgage, to execute its said trust in the way and manner specified and provided in and by the said mortgage without the aid or interposition of this honorable court, in chancery sitting, nor can the said trust be executed, as your orator is advised and charges, and the rights of your orator be fully protected in the premises otherwise than by judicial sale of the mortgaged premises and of all the franchises, property, premises and appurtenances of said defendant railroad com-
17 pany; and your orator is likewise advised and charges that until such sale can be had and the proceeds thereof distributed, it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust, as aforesaid, and all the rights, franchises and property of said railroad company of whatever name, nature or description covered by said mortgage, including all its moneys on hand and the earnings of the same, be placed in and continue in the hands and under the control of a receiver appointed herein by this court, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred.

Sixteenth. That this suit is one arising under the Constitution and laws of the United States, and that the matter in controversy herein is upwards of five thousand dollars exclusive of costs.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this na-

ture are properly cognizable and relievable, to the end that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated, your orator prays:

First. That a receiver may be appointed in this cause of all and singular the rights, franchises, and property of every name
18 and nature of said defendant Atlantic and Pacific Railroad Company, with power and authority to operate said railroads and to preserve the property of said defendant, and to carry on the business of said railroad company, under the direction of this court, with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to the said railroad company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever, and that an injunction may issue out of this court restraining and enjoining the said railroad company and all and every its agents and servants from, in any way, interfering with the possession or control of the property of said railroad company under the control of said receiver, and from selling, transferring, conveying, leasing or otherwise disposing of or encumbering any of the property, rights or franchises of the said railroad company.

Second. That the said Western Division first mortgage, dated July 1, A. D., 1880, may be decreed to be a first lien upon all the property, real, personal and mixed, rights and franchises described in the said mortgage, and then owned or subsequently acquired by said defendant Atlantic and Pacific Railroad Company to secure the payment of said bonds issued thereunder, and the interest and coupons for interest on the said bonds outstanding and unpaid, and the interest thereon, and that an account be taken of the bonds secured by said first mortgage and of the amount due and unpaid on the said bonds and the coupons thereon.

Third. That said defendant Atlantic and Pacific Railroad Company may be decreed to pay all moneys now due or to become
19 due and payable under and by virtue of said first mortgage, and of the bonds issued thereunder and secured thereby, and of the coupons for interest thereon, and that in default thereof said Atlantic and Pacific Railroad Company and all persons claiming under, by or through it, or claiming any interest in said mortgaged premises and property or any part thereof, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises and every part and parcel thereof, and that all the property of said defendant railroad company, real, personal and mixed, and all the effects, rights, immunities and franchises belonging to it or covered by said mortgage may be sold under the direction of this honorable court in such manner

as the court may direct and according to the law and practice of this court, to satisfy the amount found due, and that out of the proceeds of such sale, or the net earnings while in the hands of said receiver, there may be paid first, the costs and expenses of your orator in this suit, including proper attorneys', solicitors' and counsel fees, with a proper compensation to your orator for its own service as trustee, to be allowed by the court, and that the residue thereof may be applied in such proportions and when and as the court shall order and direct, and in due order of priority, to the payment of the said bonds issued under said first mortgage and the coupons for interest thereon, together with interest on said bonds and coupons, and that any deficiency on such sale may be entered in this cause as a judgment against said defendant railway company.

Fourth. That your orator may have such other and further relief in the premises as the circumstances of the case may require and may be agreeable to equity.

20 May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, directed to the defendants Atlantic and Pacific Railroad Company, Atchison, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of the Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company and The Boston Safe Deposit and Trust Company, to appear and answer this bill.

And your orator will ever pray, &c.

UNITED STATES TRUST COMPANY
OF NEW YORK,
[SEAL.] By JOHN A. STEWART, *President.*

Attest:
H. L. THORNELL, *Secretary.*

EDWARD W. SHELDON,
Complainant's Solicitor.
FREDERICK B. JENNINGS,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Stewart, being duly sworn, depose and say that I am president of The United States Trust Company of New York, the complainant above named, and have been such president for
21 a number of years past; that I have read the foregoing bill of complaint and know the contents thereof, and that the same is true to the best of my knowledge, information and belief;

that this verification is not made by the complainant because it is a corporation; that my knowledge or information *are* derived from having taken part in some of the transactions spoken of, from statements, made to me, and from examination of the papers, and the same constitute my grounds of belief, and that the seal affixed to said bill of complaint is the corporate seal of said complainant and was so affixed by its authority.

JOHN A. STEWART.

Sworn to before me this 10th day of July, 1895.

HENRY C. KENNEDY,

[SEAL.] *Notary Public, Kings Co.*

Cert. filed N. Y. Co.

EXHIBIT A.

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the United States Trust Company of New York, a corporation duly organized and existing under the laws of — State of New York, party of the second part, witnesseth:

That whereas the party of the first part, under the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and
22 Arkansas to the Pacific coast," approved July 27, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip and put in operation as rapidly as practicable, that part of said company's authorized line of railroad and telegraph lying between the Rio Grande river and the Pacific ocean, and hereinafter described and referred to as the "Western division;"

And whereas, the party of the first part has duly executed an agreement under seal, dated January 31, 1880, wherein, among other things, it agreed with the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to complete said Western division as rapidly as practicable, and that the railroad of the St. Louis and San Francisco Railway Company and the railroad of the Atchison, Topeka and Santa Fe Railroad Company and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast for and during the term of thirty (30) years from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910; and in consideration thereof said Atchison, Topeka and Santa Fe Railroad Company and said St. Louis and San Francisco Railway Company have executed the contract of guaranty indorsed hereon;

And whereas, said act of Congress provides as follows:

23 "SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that

24 the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first and seventeenth sections of this act: Provided, further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

"SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior, and if

it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said
25 completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

And whereas, by an act of Congress, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20, 1871, it was enacted as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior; provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mort-
26 gage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And, whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the "Western division," has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even date herewith; and said coupon bonds are all of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Coupon Six per Cent. Gold Bond.

Know all men by these presents that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee or bearer, one thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, together with interest thereon at the rate of six per cent. per annum in like gold coin, payable semi-annually on the first days of January and July, according to the tenor
27 of the coupons hereto annexed, and upon presentation thereof as they severally fall due; both principal and interest will be paid at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor; and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith, to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any
28 advances made by the Atchison, Topeka and Sante Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgaged bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic

and Pacific Railroad Company under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the books of the Atlantic and Pacific Railroad Company at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880,

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

29 And said registered bonds are of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $5,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Registered Six per Cent. Gold Bond.

Know all men by these presents that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of July, A. D., 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, with interest thereon at the rate of six per cent. per annum in like gold coin, payable semi-annually on the first days of January and July; both principal and interest payable at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for payment thereof to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the railroad company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by
30 reason of priority of issue, or of any cause or thing whatsoever, are equally protected and payment thereof equally secured by a first mortgage of even date herewith, to the United States Trust

Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants and other property pertaining to said Western division as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company under their contract endorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said
31 mortgage. And this bond is entitled to the benefit of such provisions.

This bond is not valid unless authenticated by a certificate endorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the following certificate is to be endorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a first mortgage of even date herewith, executed by said railroad company to the United States Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Western division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, endorsed upon said mortgage.

—— ——, *Trustee.*

32 And whereas, the party of the first part, being about to issue some of said bonds and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desires to secure the principal and interest of all the said bonds by a mortgage of the franchises and properties hereinafter described to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of said bonds, without any preference by reason of priority of issue, or any other cause or thing whatsoever, and the party of the second part has signified its willingness to accept said trust:

Now, therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does, by these presents, grant, bargain, sell, transfer, assign and convey to the party of the second part, trustee as hereinafter set forth, its successor or successors in said trust, and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found
33 most suitable for a railway route to the Colorado river, at such a point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and in equity, of the party of the first part, of, in and to the same, and any and every part thereof, with appurtenances:

To have and to hold the same to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions, and agreements, and to and for the uses and purposes hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer

any lien or attachment superior to the lien created by these presents to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds from time to time issued and negotiated shall be deposited, one-half with the United States Trust Company of New York, and one-half
34 with the Boston Safe Deposit and Trust Company of Boston, or, in whole or in part, with such other trust companies as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approved, to the credit of the party of the first part, and shall be used for the purpose of constructing, equipping, maintaining and operating said Western division of the Atlantic and Pacific Railroad Company and for the payment of the interest maturing on such bonds until the completion of said division to the Pacific coast, or until such party of the second party shall, by a contract with any other road, form a through line, properly equipped to the Pacific coast, and for one year thereafter. The party of the first part agrees to complete said Western division or form such through line, as aforesaid, with due and reasonable diligence; to furnish to the party of the second part during construction, monthly accounts, showing the application of said proceeds, and to permit, at any and all reasonable times, an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for, the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion from time to time sell the lands received from the United States under said first-named act of Congress, and any and all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the land sold, and the party of the second part, its successor or
35 successors in said trust, shall upon demand from time to time release the lands thus sold to the party of the first part, or to the purchaser thereof, as may be deemed most advisable; provided, however, that the appointment of the land commissioner shall be made by the party of the first part with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify, upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable, and such certificate shall, for the protection of the party of the second part, be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be

held subject to the control of the United States Trust Company of New York, trustee, or its successor or successors in said trust, and used solely—

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances, made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

36 Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

Provided, however, that the bonds hereby secured may be received at par and accrued interest in payment for any and all of said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other lands, buildings or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph; provided, however, that in case of sale the net proceeds thereof be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain and enjoy the railroad and telegraph composing said Western division, and all the franchises, rights and property of every kind with the appurtenances included in this mortgage, and collect, receive and use the rents, tolls, issues, income and profits thereof.

Article 5. If there shall be any default in the payment of
37 the interest of the bonds hereby secured, or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the second part, its successor or successors in said trust, may personally or by its, his or their attorney or agent, enter upon, take, possess, maintain, and operate said railroad and telegraph and all franchises, property and appurtenances of every description belonging or pertaining to said Western divis-

ion, and make any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income and profits thereof, and shall sell and dispose of said lands and land grants; and, after paying all taxes, assessments and liens superior to the lien created by these presents, and all proper expenses of construction, operating and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows, namely:

First. To the payment of interest on said first-mortgage bonds.

Second. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third in amount of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due the said remainder shall be applied to payment of interest and principal without preference.

Third. If said principal is not due or elected to be consid-
38 ered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3, and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest-bearing indebtedness pertaining to said Western division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And, if the earnings of said railroad and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid, shall surrender and restore the railroad and telegraph with all the rights, franchises and property of every kind pertaining to said Western division, and all additions thereto and extensions thereof, and, reserving all funds which should be retained and applied under article 3, shall deliver up all moneys, bills, accounts, claims and demands of every name and nature pertaining to said Western division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage; provided, however, that any default may be waived by the written assent thereto of a majority in interest of the bonds outstanding; but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described
39 in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth in amount of said first-mortgage bonds outstanding, with indemnity for expenses liable to be incurred, shall, with or without

entry, sell the said franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all property of every description then composing and pertaining to said Western division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago and San Francisco, not less than three times a week for six consecutive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale *and* good and sufficient deed or deeds in the law for the same in fee-simple; which sale and conveyance made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first part, and all persons claiming through, by or under the said party. The party of the second part, its successor or successors in said trust, may purchase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under any obligation to inquire into the necessity, expediency or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mortgage bonds hereby secured; and any surplus then remaining
40 shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the first-mortgage bonds secured hereby which may be issued, according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall, from time to time, and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph equipments and appurtenances hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Western division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with
41 the written assent of the holders of one-fourth in amount of all said bonds outstanding; and any vacancy in the trustee-

ship hereby created, occasioned by the dissolution, death, resignation, removal, incapacity or refusal to act of the present or any succeeding trustee, may be filled by appointment made by the party of the first part,, it successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And, if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon the application of the party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests and and powers before vested in his or its predecessor under this mortgage, and upon the trusts, agreements and conditions, and to and for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors and administrators respectively, that they will execute, acknowledge and deliver, each to his or its respective successor or
successors in said trust, from time to time, and at all times as
42 often as requested thereunto by the party of the first part,
its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances and assurances in the law for the better assuring to such successor or successors the said estates, rights, titles, properties, interests and powers as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis and San Francisco, twice each week for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfacfory to said meeting that they are *bona fide* holders of said bonds, shall be entitled in person, or by attorney, to vote in proportion to the amounts held by them.

Article 10. The present trustee, its successor or sucessors in said trust, may, in case of necessity, employ agents, attorneys or servants in the discharge of said trust, and the just and reasonable charges of said trustee and its agents, attorneys and servants shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and

shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered or neglected by its or their agents, attorneys, servants or employés selected in good
43 faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary; and the United States Trust Company of New York, in token of its acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secretary, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
By THOMAS NICKERSON, *President.*

Attest: S. W. REYNOLDS, *Secretary.*

UNITED STATES TRUST COMPANY OF NEW YORK,
[SEAL.] By JOHN A. STEWART, *President.*

Attest: J. S. CLARK, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

On this third day of August, A. D. 1880, before me, Levy C. Wade, a notary public in and for said county of Suffolk, per-
44 sonally appeared Thomas Nickerson and S. W. Reynolds, known to me to be, respectively, in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that, by order of the board of directors of said company, they signed, attested and sealed with said company's seal the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[NOTARIAL SEAL.] LEVI C. WADE.

STATE OF NEW YORK, *City and County of New York,* } ss:

On this ninth day of August, A. D. 1880, before me came John A. Stewart, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in said city: that he is the president of the United States Trust Company of New York; that he knows the corporate seal of said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by authority of the board

of trustees of said corporation; and that he signed the same as president of said corporation by the like authority.

[NOTARIAL SEAL.] HENRY L. THORNELL,
Notary Public, New York Co.

EXHIBIT B.

Whereas, the St. Louis and San Francisco Railway Company, the Atlantic and Pacific Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company duly executed an agreement under seal, dated January 31, 1880, wherein among other things, they agreed that the railroad of the St. Louis and San Fran-
45 cisco Railway Company, and the railroad of the Atchison, Topeka and Santa Fe Railroad Company, and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous, through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast, for and during the term of thirty (30) years, from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910:

Now, therefore, in consideration of said agreement, and of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, do severally covenant and agree with the Atlantic and Pacific Railroad Company and the United States Trust Company of New York, trustee in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that, if at any time after twelve months following the completion of the Western division of the said company in the within mortgage mentioned, or after twelve months after the Atlantic and Pacific Railroad Company shall, by a contract with any other road, have formed a through line to the Pacific coast, its earnings should prove insufficient to pay all coupons on said bonds as they mature, they will contribute, ratably, to the earnings, hereinafter described, for the purpose of paying and cancelling the same from their respective earnings upon all business received from and delivered to said Western division, by and from their lines of road
46 as above set forth, such sum as may be necessary to make up the deficiency of the earnings of the said Atlantic and Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty-five per cent. (25 per cent.) of the gross amount of their said described earnings respectively during the six months, ending on the first days of October and April, preceding the due date of such coupons.

In witness whereof, the said St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company have severally caused their corporate seals to be at-
[SEAL.] tached hereto, and these presents to be signed by their respective presidents and attested by the secretary of the

first-named and the assistant secretary of the last-named company, on this first day of July, A. D. 1880.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
[SEAL.] By E. F. WINSLOW, *President.*

Attest:
C. LITTLEFIELD, *Secretary.*

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,
[SEAL.] By T. JEFFERSON COOLIDGE, *President.*

Attest:
GEO. L. GOODWIN,
Assistant Secretary.

47 And thereafter and on, to wit: the 10th day of January, 1896, there was an order duly made and entered of record in the said cause appointing a receiver of the property and franchises of the Atlantic and Pacific Railroad Company, which said order is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY, of New York, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants. } No. 1122.

Order Appointing Receiver.

Now on this 10th day of January, A. D. 1896, comes the complainant, The United States Trust Company of New York, by Neill B. Field, one of its solicitors; and also come the defendants, except the defendant, The Boston Safe Deposit and Trust Company, by their respective solicitors, and thereupon, upon the record in this cause, comes on for hearing the application of The United States Trust Company of New York for the appointment of a receiver herein, which application is consented to by the defendants, The Atlantic and Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railroad Company, The St. Louis and San Francisco Rail-
48 way Company, and the receivers of the property and franchises of said three last-named corporations, The Mercantile Trust Company, defendant herein, not consenting, and the same having been heard by the court, and the court being now fully advised in the premises—

It is now hereby ordered, adjudged and decreed, that Charles W. Smith be and he hereby is appointed receiver of all and singular

the lands, tenements and hereditaments of the said Atlantic and Pacific Railroad Company covered by the mortgage sought to be foreclosed herein, and also all personal estate thereof, including all its railroad tracks, rights of way, sidings, structures, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with its leases, rights under lease, rents from hired lands or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks, and other rolling stock, its machinery, tools, scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description; and all its stocks, bonds and obligations, choses in action, accounts and rights under contracts now owned or possessed by the said defendant railroad company, covered by the mortgage sought to be foreclosed herein, together with the corporate rights, immunities and franchises, and all of the tools, fares, freights, rents, income and profits covered by said mortgage; and that the said receiver be and he is hereby authorized and directed to take possession of all and singular the railroads and properties above described, or above referred to, wherever situated or found, and to continue the operation of the said railroad, and every part or portion thereof,
49 and to run, manage and operate the said railroad, and every part or portion thereof, and such other railroads as the said defendant railroad company owns or holds, controls or operates under lease, contract, arrangement or otherwise, as heretofore run and operated, or which have been, or are being operated by, for or in the interest of the said Atlantic and Pacific Railroad Company, and to conduct the business and occupation of a common carrier of passengers and freight; and to discharge all public and governmental duties obligatory upon said corporation or upon any other corporation whose lines of road are now in the possession of or operated by the said Atlantic and Pacific Railroad Company, and to preserve the said property in proper condition, and repair the same so that it may be safely and advantageously used, and to protect the same, and to employ such persons and make such payments and disbursements as may be needful and proper in so doing.

It is further ordered, That the said receiver, within the next thirty days, file with the clerk of the court a proper bond with sureties, to be approved by the judge of this court, in the penal sum of fifty thousand dollars, conditioned for the faithful discharge of his duties, and to account for all funds given into his hands according to the orders of this court.

Each and every of the officers, attorneys, agents or employés of the said Atlantic and Pacific Railroad Company, and all other persons or corporations are hereby required to turn over and deliver to such receiver, or his duly constituted representatives, any and all railroad property, books of account, vouchers, deeds, leases, contracts, bills, notes, accounts, moneys, stocks, bonds or obligations, or other property in his or their hands and in his or their con-
50 trol; and each and every of such attorneys, officers, agents, employés, persons or corporations are hereby required and

commanded to obey and conform to such orders as may be given them from time to time by such receiver, or his duly constituted representatives, in conducting the operations of such property, and in discharge of his duties as such receiver.

And it is further ordered, adjudged and decreed, that the said defendant, its agents, officers and servants, and all other persons be, and the same are hereby restrained and enjoined during the pendency of this action from interfering with, transferring, selling, or disposing of any of the property of the said defendant railroad company, or from taking possession of or in any manner whatever interfering with the same or any part thereof, or from interfering in any manner whatever with the possession or management of any of said property over which the receiver is hereby appointed or from interfering in any manner to prevent the discharge of his duties or from the operation of the said property under the order of this court.

And the said receiver is hereby fully authorized to operate the said Atlantic and Pacific railroad and to manage the property of the said corporation in such manner as will in his judgment produce the most satisfactory results, consistent with the discharge of the public duties imposed thereon; and to collect and receive all of the income therefrom, and all of the debts due the said company of all kinds, and for such purpose is hereby vested with the full power in his discretion to employ and discharge, and to fix the compensation of such officers, agents, attorneys, managers, superintendents and employés as are necessary to aid in the dis-
51 charge of his duties, except that the said receiver shall continue in service all the officers and employés of the receivers heretofore appointed by this court in the case of The Mercantile Trust Company *vs.* The Atlantic and Pacific Railroad Company *et al.*, numbered 999 on the calendar of this court, in the respective positions they occupy, for at least one month after qualification and entrance upon duty by said receiver, provided that for special cause, approved by the court, any or either of said officers or employés may be sooner removed or discharged; and provided further, that this exception shall not prevent discharge or dismissal from service, of any officer or employé for neglect of duty or disobedience of orders or regulations given or prescribed; and he shall have power, with the sanction of the court, to redeem any and all of the securities of the company now pledged as securities on loans of money.

The said receiver is fully authorized and empowered to institute and prosecute such suits that may be necessary in his judgment for the proper protection of the property and trusts hereby vested in him, and to likewise defend all such actions instituted against him as such receiver, and also to come in and aid in the prosecution and defense of any of the suits now pending against the Atlantic and Pacific Railroad Company, the prosecution or defense of which will in his judgment be necessary for the proper protection of the property placed in his charge.

It is further ordered, adjudged and decreed, that out of the moneys

that shall come into his hands, as such receiver, from the operation of the said railroad properties, or otherwise, he shall:

First. Pay all current expenses incident to the creation and administration of this trust and to the operation of the said railways or railroads and properties.

52 Second. Pay all sums due or to become due connecting or intersecting lines of railways, arising from the interchange of business and for track service of other railroads used by said defendant in the operation of its lines and traffic, and car-mileage balances and all amounts now due from the defendant on its road or properties, constituting part of the said system, for taxes and assessments upon the property, or any part thereof.

Third. To pay all sums which are now due and have accrued since the first day of July, 1893, for material or supplies used in the operation or maintenance of said defendant railroad company; and also all sums or amounts due for wages to officers, agents or employés of the defendant railroad company accruing since the first day of July, 1893.

Fourth. To pay all liabilities or damages which may have been or shall be incurred by any person or corporation who may have become sureties of the said defendant company on stay, supersedeas or cost bonds, or upon any garnishment proceedings, or bonds of other like character without regard to the date of said bonds.

It is further ordered, adjudged and decreed, that the appointment of the said Charles W. Smith as such receiver, and the powers by this order conferred upon him, shall be and become operative, in force and vested from the first day of February, A. D. 1896; that the transfer of the property from the receiver in the Mercantile Trust Company case to the receiver hereby appointed, is made upon the express condition to which the United States Trust Company of New York expressly assents, that this court may in this case,

53 before all priorities and allowances which it could have enforced in the said Mercantile Trust Company case if there had been no change in the receivership.

N. C. COLLIER,
Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Second Judicial District Court Thereof.

And thereafter, on to wit: the 10th day of June A. D. 1897, there was filed in the office of the clerk of the said court, in said cause, an intervening petition of the Territory of New Mexico, as to Valencia county taxes for 1896, which said petition is in the words and figures following, to wit:

In the District Court, Second Judicial District, Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK }
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.* }

To the Honorable Neeham C. Collier, associate justice of the supreme court of said Territory and judge of said district court:

Your petitioner, The Territory of New Mexico, respectfully shows to your honor the following:

1. Certain property of the Atlantic and Pacific Railroad Company was omitted in the assessment of taxable property within the county of Valencia in the Territory of New Mexico for a series of years beginning with the year 1892 and ending with the year 1896, and was not put upon the assessor's books for said years, and the assessor in said county having failed to list the same or place it upon his roll before it was returned to the county commissioners, the
54 collector of taxes in said county, after the tax-list for the year 1896 had been delivered to him, proceeded to list, value and assess such property in the manner that the assessor might have done, and to enter such assessment in his tax-list and to assess taxes thereon as hereinafter in detail more fully set forth.

2. The said collector, for the year 1892, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof from which it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1892, for territorial and county purposes, was at the rate of twenty-one and nine-tenths mills, so that the amount of tax upon the valuation aforesaid amounts to $13,586.54, one-half of which became delinquent upon the first day of January, 1893, and the other half on the first day of July, 1893, said halves bearing interest respectively, from said respective dates at the rate of twenty-five per centum per annum.

3. The said collector, for the year 1893, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1893, for territorial and county purposes, was at the rate of thirty-seven and five-tenths mills, so that the amount of tax upon the valuation aforesaid amounts to
55 $23,064.63, one-half of which became delinquent upon the first day of January, 1894, and the other half on the first day of July, 1894, said halves bearing interest respectively, from said respective dates at the rate of twenty-five per centum per annum.

4. The said collector, for the year, 1894, entered upon his tax-list

as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $626,399. The tax regularly levied by the proper authorities upon all property within said county for the year 1894, for territorial and county purposes, was at the rate of thirty-six and seventy-five hundredths mills, so that the amount of tax upon the valuation aforesaid amounts to $23,020.16, one-half of which became delinquent upon the first day of January, 1895, and the other half on the first day of July, 1895, said halves bearing interest respectively from said respective dates at the rate of twenty-five per centum per annum.

5. The said collector, for the year 1895, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $626,399. The tax regularly levied by the proper authorities upon all property within said county for the year 1895, for territorial and county purposes, was at the rate of thirty-six and seventy-five hundredths mills, so that the amount of tax upon the valuation aforesaid amounts to $23,020.16, one-half of which became delinquent upon the first day of January, 1896, and the other half on the first day of July,
56 1896, said halves bearing interest respectively from said respective dates at the rate of twenty-five per centum per annum.

6. The said collector, for the year 1896, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is hereto attached and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $626,399. The tax regularly levied by the proper authorities upon all property within said county for the year 1896, for territorial and county purposes, was at the rate of thirty-eight and seventy-five hundredths mills, so that the amount of tax upon the valuation aforesaid amounts to $24,272.96, one-half of which became delinquent upon the first day of January, 1897, and bears interest from that date at the rate of twenty-five per centum per annum; and the other half will become delinquent on the first day of July, 1897, and will thereafter bear interest at said rate of twenty-five per centum per annum.

7. The receiver of the property of the said railroad company, heretofore appointed in this cause refuses to pay the said taxes or any part thereof and disputes the validity of the same upon the ground that all of the property so listed, valued and assessed as aforesaid is exempt from taxation by virtue of the provision contained in the second section of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which became a law on the 27th day of July, 1866; but your petitioner charges that the said exemption from taxation extends only

to the right of way granted to said railroad company on each
57 side of its railroad, where it may pass through the public domain, and does not extend to any improvements made upon the said right of way, nor to the said right of way itself where it passes through land not included in the public domain.

Your petitioner therefore prays that the said taxes so levied as aforesaid may be declared by decree of this court to be a lien upon said property of said railroad company, now in the hands of the said receiver, and that the said receiver may be ordered and directed to pay the said taxes, together with the interest thereon, to the collector of taxes in and for said county of Valencia, and that your petitioner may have such other and further relief as equity may require and to your honor shall seem meet.

F. W. CLANCY,
Solicitor for Petitioner.

And thereafter, on, to wit: the 10th day of June, A. D., 1897, there was duly made and entered of record, the same being in vacation, an order as to intervention of Territory of New Mexico *in re* Valencia county taxes which said order is in the words and figures following, that is to say:

In the District Court, Second Judicial District, Territory of New Mexico.

UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*

Upon reading and filing the intervening petition of the Territory of New Mexico, and after hearing F. W. Clancy, Esq., solicitor for said intervening petitioner, it is ordered by the court that the said Territory of New Mexico be and hereby is given leave to intervene
58 herein and that the parties hereto who have appeared herein are required to show cause before the judge of this court at the court-house, in the county of Bernalillo, on the 15th day of June, 1897, at ten o'clock in the forenoon of said day, why the prayer of said petitioner should not be granted, service of copies of said petition and of this order to be made not later than the 10th day of June, 1897, upon the solicitor for complainant, the solicitor for the Mercantile Trust Company and the solicitor for the said receiver, such service to be made in accordance with the usual practice of this court.

N. C. COLLIER, *Judge.*

And thereafter, on to wit: the 23rd day of June, A. D. 1897, there was filed in the office of the clerk of the said court in this cause, joint and several pleas of United States Trust Company and C. W. Smith, receiver, A. & P. R. R. Co., which said pleas are in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Plaintiff,
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*

In the matter of the intervening petition of the Territory of New Mexico filed in this cause.

The joint and several pleas of the United States Trust Company and C. W. Smith, receiver of the Atlantic and Pacific Railroad
59 Company, appointed by this court in the above-entitled cause, to the intervening petition of the Territory of New Mexico for the collection of taxes alleged to be due in Valencia county.

First Plea.

The United States Trust Company, complainant herein, and C. W. Smith, the receiver of the property of the Atlantic and Pacific Railroad Company, by protestation, not confessing or acknowledging all or any part of the matters and things in the intervening petition of the Territory of New Mexico to be true, in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied or assessed for a series of years commencing with the year, A. D. 1892, and ending with the year 1896, against the Atlantic and Pacific Railroad Company, or its property, and particularly in relation to the amount of taxes alleged to have been levied and assessed for the year 1892, against said company or its property, in the sum of $13,586.54, the following facts in bar thereof, and in bar of the right of the Territory of New Mexico to receive or collect any amount of the taxes mentioned or described in said intervening petition for any of the years mentioned therein, and particularly said sum of $13,586.54, or any part thereof, taxes so alleged to have been levied and assessed for the year 1892, as aforesaid:

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act and prior to the year 1885, the Atlantic and Pacific Railroad
60 Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93,458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at that time belonged to the Government of the United States, and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width

under and by virtue of said act of Congress, both through the lands belonging to the United States, as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way, through Valencia county, in said Territory, 3,433 miles of sidings, making a total amount of trackage in Valencia county in said Territory in the year 1892 of 96,891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1892 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds for station building, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and

61 are now stations upon said line of railroad is said county and Territory named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grants and Bluewater.

That upon said right of way and station grounds, prior to 1892, and up to January 4, 1893, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon, bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly imbedded in this grade which consists of earth, gravel, cinders and stone; and that the rails for its main and side-tracks are spiked to and firmly fastened to its ties so embedded in said grade so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side track; and that the buildings at the stations above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

62 That in the year 1892 the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the

property hereinabove described, a large amount of land, which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That on and after the first day of March, 1892, and within the time required by law, one, A. M. Bergere, the then duly qualified and acting assessor of Valencia county, Territory of New Mexico, for the year, A. D., 1892, pretended and claimed to assess, and to enter upon the assessment-roll for said county and Territory, for said year, the assessment of all the property of the Atlantic and Pacific Railroad Company in Valencia county, in said Territory, subject to taxation, and for the purpose of making such assessment in conformity with the requirements of law, made and entered upon the assessment-roll, for said year, in said county, certain entries relative to the Atlantic and Pacific Railroad Company and its property, both real and personal; a true, perfect, correct and complete copy of said assessment-roll, in so far as it shows any entries for the year 1892, of or concerning the Atlantic and Pacific Railroad Company, or its property, is filed herewith, marked "Receiver's Exhibit No. 1," and the same by reference thereto is made a part of this plea.

That thereupon the said county assessor, upon a leaf in the assessment-roll opposite to the leaf in said roll containing the assessment of the Atlantic and Pacific railroad, and its property, as shown by Receiver's Exhibit No. 1, entered and extended the various levies of taxes for said county for said year 1892, against said property and each item thereof; a full, true and complete copy of the
63 taxes levied against the Atlantic and Pacific Railroad Company and its property, and each item thereof, in said county, by said assessor, for said year A. D. 1892, as extended by him upon the page of said assessment-roll opposite the page containing the assessment itself, is shown by the paper herewith filed, marked "Receiver's Exhibit No. 2," which by reference thereto is made a part hereof.

That on the 5th day of September, 1892, the board of county commissioners of Valencia county, Territory of New Mexico, endorsed on the back of the assessment and tax roll so made by said assessor, as aforesaid their approval and warrant to the collector, a true and correct copy of which is shown on the back of the paper marked "Receiver's Exhibit No. 2," and to which reference is hereby made.

That on the 5th day of September, A. D. 1892, the said assessor duly verified his assessment and tax roll, a true copy of which verification is shown endorsed on the back of the paper marked "Receiver's Exhibit No. 2," and made a part hereof by reference thereto.

That on the 5th day of September, A. D. 1892, one Tranquilino Luna, now deceased, and who was then sheriff and *ex officio* collector of taxes for said county, endorsed upon the copy of the assessment-roll and tax-roll on that day delivered to him by the assessor a receipt, a copy of which is shown by the endorsement on the back

of the paper marked "Receiver's Exhibit No. 2," and made a part hereof by reference thereto.

That the assessor in the year 1892, in accordance with law, made three assessment-rolls which contained the assessment of the property both real and personal, of Valencia county, in said Territory, for that year, with the taxes levied and extended thereon
64 against each item of property assessed, in the manner shown by Receiver's Exhibits 1 and 2, and one of said assessment-rolls was delivered to the territorial auditor, and one of said assessment-rolls was retained in the office of said assessor, and the other of said assessment-rolls was delivered to the said Tranquilino Luna, sheriff and *ex officio* tax collector as aforesaid.

That Receiver's Exhibits Nos. 1 and 2 filed herewith are copies of that portion of the assessment and tax-roll delivered by the assessor of said county to the said late Tranquilino Luna, as said sheriff and *ex officio* tax collector, and which in anywise described any property belonging to the Atlantic and Pacific Railroad Company, or against which any tax was extended or levied for the year A. D. 1892, and such exhibits show exactly everything that was done in that year in the way of assessing the property of said railroad company, and of levying or extending a tax against the same, as the same appears upon the original assessment-roll.

That on or about the — day of ——, 1892, the Atlantic and Pacific Railroad Company paid to the said late Tranquilino Luna as sheriff and *ex officio* collector of taxes, the sum of $43.90, being the amount of tax levied upon the personal property of the Atlantic and Pacific Railroad Company, which was assessed upon said assessment-roll in the hands of said Luna in the column therein headed "Value of cattle" in the sum of $2,004.90, as will appear from said Receiver's Exhibit No. 1.

That there was no personal property of any kind, nature or description belonging to the said railroad company in Valencia county, which was subject to taxation in that county for the year A. D. 1892, which was not included in the assessment of $2,004.99 aforesaid, and upon which the said tax of $43.90 was levied
65 and paid; and that during said year, the railroad company neither had owned, or had in its possession or under its control, any cattle in Valencia county, or any cattle subject to taxation in that county.

That on or about the — day of ——, 1892, the Atlantic and Pacific Railroad Company paid to the late Tranquilino Luna, as sheriff and *ex officio* collector of Valencia county, the further sum of $1,045.74, being the tax levied against that portion of its land grant which was and is situated in Valencia county in said Territory, and which, upon said assessment-roll, under the head of "Value of lands," was assessed at the sum of $31,529.61, as appears by reference to said Receiver's Exhibit, No. 1; true and correct copies of the receipts given by the said Tranquilino Luna are filed with this plea, marked Receiver's Exhibits 3 and 4, reference to which is hereby made and the same made a part of this plea.

That no other or further assessment was ever made by any officer of Valencia county in said Territory in the year 1892, of any prop-

erty belonging to the Atlantic and Pacific Railroad Company other than that shown by Receiver's Exhibit No. 1, and no other or further levy or extension of taxes against such assessment was ever made during said year, for said year or any other year, save and except that shown by Receiver's Exhibit No. 2.

That the entire rate of taxation in Valencia county for the year 1892, including each, all and every tax authorized to be levied, was and is the sum of $2.19 on each $100 of assessed valuation.

That the assessment and tax rolls of said county and Territory for said year, retained by said assessor, and the one sent to the
66 territorial auditor, are substantially duplicates of the one delivered to the said Tranquilino Luna.

That in the year 1892 the officers having charge of such matters for the Atlantic and Pacific Railroad Company, made a return to the county assessor of said county of the property of said railroad company situated in said county and Territory, and the return so made of the property is shown by Receiver's Exhibit No. 11, which is a true copy, and which by reference thereto is made a part hereof.

That the other property returned by the taxing officers of said railroad company for said year, was and is the property upon which the taxes are paid as above stated, and as shown by Receiver's Exhibits 3 and 4.

That the only pretended or claimed levy of taxes against any property of the Atlantic and Pacific Railroad Company for the said year, remaining unpaid, is that shown to have been extended and levied upon the "right of way" of the Atlantic and Pacific Railroad Company which was and is assessed at the lump sum of $327,103, upon the assessment-roll for said year, together with the further sums placed in said assessment-roll in the column headed "Value of cattle," opposite the words contained in the column in said assessment-roll headed "Name of property-owners," save and except as hereinafter stated.

The names and sums referred to are as follows:

Rio Puerco, 1st	$1,888 00
El Rito, 3rd	541 00
Laguna, 4th	677 00
Cubero, 6th	2,145 00
McCarty's, 7th	682 00
Grants, 8th	1,383 00
Btuewater, 9th	3,150 00
67 San Jose, 2nd	1,316 00

All of which is shown by the said assessment and levy of taxes upon said assessment-roll, as will fully appear by reference to said Receiver's Exhibits No. 1 and No. 2, and the endorsements thereon.

That prior to the first day of January, 1894, the Atlantic and Pacific Railroad Company paid each and every item of taxes assessed and levied against it or its property in said Valencia county, Territory of New Mexico, save and except only that levied against the assessed value of its "right of way," and that levied against the figures set opposite the names of the stations as hereinabove set forth and described.

Receiver's Exhibit No. 1.

Assessment-roll for Valencia County, 1892.

	Name of property-owner.	Prec'ct No.	Real estate.										Value of land.	Val. of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Deductions.
			Fraction or other description.	Section.	T'nship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Add'on.						
1																		
2																		
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18																		
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20																		
21																		
22	Atlantic & Pacific R. R. Co																	
23	Grant'd lands as per list on file						157,648 04	.20					$31,529 61		$31,529 61	$2,004 99		
24	Personal property as follows																	
25	Rio Puerco, 1st															1,888 00		
26	El Rito, 3d															541 00		
27	Laguna, 4th															677 00		
28	Cubero, 6th															2,145 00		
29	McCarty's, 7th															682 00		
30	Grant's, 8th															1,383 00		
31	Bluewater, 9th															3,150 00		
32	San Jose, 2d															1,316 00		
33	Total value of right of way														327,103 00			
34																		

RECEIVER'S EXHIBIT No. 2

Territory of New Mexico for 1892

	Fixed by assessor.	Fixed by county commissioner.	Fixed by ter. board equalizat'n.	Final assessed value.	Territorial tax.				County tax.							City tax.			Total tax.
					For territorial purposes.	Territorial institutions.	Capitol bonds.	Insane asylum.	School tax.	General tax.	County additional.	Interest, funded debt, '82 and '83.	Sinking-fund bonds, '82 & '83.	Interest, funded debt, '85.	Interest, funded debt, '89.	Interest, current-expense bonds.	Road and bridge.	Unpaid interest, funded debt.	Cattle indemnity.	Total.	
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32																					
33		388,184 40		388,184 40	2,523 21	388 18	38 86	19 40	1,164 55	970 46	194 09	560 03	776 37	62 10	861 76	116 46	194 09	601 08		8,501 24
34																					

Dollar, cent, and mill ($ c. m.) marks omitted.

70 (The following on a printed blank is pasted in the back of the book.)

Oath of Assessor.

I, A. M. Bergere, assessor of the county of Valencia, Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment, I have made diligent inquiry and examination to ascertain all the property within said county, subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value, and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the Territory, and that I have not imposed any unjust assessment through malice or ill will, nor allowed any one to escape a just and equal assessment through favor or reward, so help me God.

A. M. BERGERE, *Assessor.*

Sworn to and subscribed before me this 5th day of September, A. D. 1892.

CARLOS BACA,
Clerk of the Board of County Commissioners.

Office of the board of county commissioners, Valencia county.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

At a regular session, held on the 5th day of September, A. D. 1892.

It is ordered by the board of county commissioners of the said county: That the preceding assessment-roll, and each and every assessment therein contained, as originally returned and as-
71 sessed or as shown therein to have been revised and corrected by the board, be and the same is hereby approved.

And that a tax of 11.25 mills upon each dollar of taxable property for county purposes, and of three mills on the dollar for school purposes, and 7.65 mills for various territorial funds, to wit:

For territorial purposes fixed by the act of the Legislative Assembly, approved February 26, 1891, 6.50 mills on the dollar; for territorial institutions, act of February 28, 1889, 1 mill on the dollar; for interest on the capitol bonds, .10 mills on the dollar; insane asylum bonds, .05 mills on the dollar. Total levy for all territorial purposes, 7.65 mills on the dollar; cattle indemnity fund $\frac{50}{100}$ mills on the dollar on the appraised value of all cattle; is hereby levied upon all the property therein returned assessed liable to taxation. And it is further ordered that the assessor of the county enter the several said rates of taxes upon the tax-roll for the year 1892, and that upon the delivery of the tax-roll to the county collector, the county clerk shall charge said collector with the aggregate amount of said several taxes as provided by law.

To the sheriff and *ex officio* collector of the county of Valencia, in said Territory, Greeting:

You are hereby commanded, in accordance with the laws of said Territory, in such cases made and provided, to collect all territorial, county, school, city and all other taxes above enumerated and specified, levied on the citizens of said county, and non-resident property-owners whose property may have been assessed in your county, and all taxes assessed upon property within said county as appears from the tax-list of said county for the year 189–, being the foregoing tax-list, and the delinquent tax-lists of said county for
72 previous years, and also that you collect all interest due on delinquent taxes as provided by the laws of said Territory.

In witness whereof we have hereunto set our hands and caused the seal of said board to be hereunto affixed, attested by the clerk of said board, this 5th day of September, A. D. 1892.

SILVESTRE MIRABAL,
Chairman of Board.
NESTOR JARAMILLO,
JUAN JOSE BENAVIDES,
Commissioners.

Attest: CARLOS BACA,
Probate Clerk and ex Officio Clerk of the Board of County Commissioners.

SEPTEMBER 5, A. D. 1892.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Received of A. M. Bergere, assessor of said county, the tax-lists or assessment-rolls of said county for the year 1892, which amounts to $47,005.00, territorial, school and county funds, viz:

For territorial purposes	$13,910 85
" " institutions	2,140 13
" interest on capitol bonds	214 01
Insane asylum bonds	107 00
For school fund	6,420 40
General tax (county)	5,350 32
County additional	1,070 06
Interest on bonds '82 and '83	5,253 00
" " '85	342 42
" " '89	4,750 09
73 Interest on current expense bonds	642 03
Road and bridge fund	1,070 06
Unpaid interest due 1892	3,317 20
Cattle indemnity fund	136 17
Total	$47,005 00

Witness my hand this 5th day of September, A. D. 1892.

TRANQUILINO LUNA,
Sheriff and ex Officio Collector in and for said County.

6—458

74 RECEIVER'S EXHIBIT No. 3.

Duplicate.

Auditor's No. 701, series 2.
Recorded in Nov., 1892.

Atlantic & Pacific Railroad Company (Western division) to Tranquiliana Luna, sheriff and *ex officio* collector, Dr.

Valencia county, N. M.

1892.

Nov.	1	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, N. M., from the Atlantic and Pacific Railroad Company, for the year 1892, as follows (not including right of way or land grant):		
		Personal property, section tools, etc.... $315 99		
		Office, telegraph, and station furniture. 1,689 00		
		Total $2,004 99		
		Tax at $2.19	.....	$43 90

Examined by— — —. Correct: — —. Approved: — —.

Approved: C. N. STERRY, *General Attorney.* Approved: — —, *Local Auditor.* Approved: — —, *General Manager.*

Charge to acc't.

No.	Letter.	Division.	Amount.
....	.....	Tax	$43 90
....	.....	.....	.....
....	.....	.....	.....
....	.....	.....	.....
....	.....	.....	.....
Common....	.....		$43 90

Received Dec. 5, 1892, from Atlantic & Pacific Railroad Company forty-three $\frac{90}{100}$ dollars, in full payment of above account.
(Signed in duplicate.)
SOLOMON LUNA,
Sheriff and ex Officio Collector, Valencia County.

75 RECEIVER'S EXHIBIT No. 4.

Duplicate.

Paid by check —. No. 1703—9.

Atlantic & Pacific Railroad Company, land department, to Tranquiliana Luna, sheriff and *ex officio* collector, Valencia Co., Dr.

Los Lunas, New Mexico.

1892.

Nov.	2	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, New Mexico, for the year 1892, from the land department of the Atlantic and Pacific Railroad Company for that portion of its land grant situated in Valencia county, New Mexico, amounting to 157,648.04 acres..... ...	.....	$1,045 74

Examined by— — —.

Approved: — —, *Auditor.* Approved: — —, *Land Commissioner.* Approved: — —.

Charge to—	$	Cts.
Taxes	1,045	74
Common	1,045	74

Received Dec. 5, 1892, from Atlantic & Pacific Railroad Company one thousand and forty-five and $\frac{74}{100}$ dollars, in full payment of above account.

(Signed in duplicate.)

SOLOMON LUNA,
Sheriff and ex Officio Collector,
Valencia County.

76 RECEIVER'S EXHIBIT No. 11.

List of real estate of the Atlantic and Pacific Railroad Company, situate in the county of Valencia and Territory of New Mexico, listed by the said company for the fiscal year 1892, under protest, and with the express understanding that said company by making said list does not in any manner waive its right to exemption from taxation under the act of Congress whereby it was created, and asserts that all of the real estate herewith listed, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, and the structures placed thereon or attached thereto for the purpose of operating and maintaining said road and transacting and carrying on its business, are and were by the second section of said act of Congress, expressly exempted from taxation within the territories of the United States:

The right of way for said railroad, one hundred feet on each side thereof, commencing at station 249–13, the point where said railroad enters said county of Valencia from the northeast, and at the dividing line between the county of Valencia and the county of Bernalillo on the east, thence in a westerly direction 93.458 miles to the northern boundary line of said county of Valencia, at station 5247, together with all the ties, iron and steel rails, fish-plates, bolts, spikes, grades, cuts, fills, bridges, culverts and other material constituting and composing the road-bed, track and railroad of said company, together with the telegraph line erected upon and constructed over said right of way, $327,103.00.

All necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water
77 stations, together with the fixed and permanent improvements placed thereon and attached thereto for the purpose of operating and maintaining said railroad, to wit:

Rio Puerco	$1,888 00
San Jose	541 00
El Rito	677 00
Laguna (Indian reservation)	2,145 00
Cubero	682 00
McCarty's (Indian reservation)	1,383 00

Grant's	3,150 00
Bluewater	1,316 00
	$11,782 00
Total value of right of way	327,103 00
Grand total	$338,885 00

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } ss:

I, C. N. Sterry, do solemnly swear that I am the general attorney of the Atlantic and Pacific Railroad Company, and that, to the best of my knowledge and belief, the above and foregoing contains a full, true and correct statement of all the real estate owned, claimed by, or in the possession or under the control of the Atlantic and Pacific Railroad Company in the county of Valencia, Territory of New Mexico, not already listed; that I am informed that the same and each and every part and parcel thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, and the structures, buildings and improvements placed thereon for the purpose of operating and maintaining said road and carrying on the business thereof, are, and were by the said act of Congress incorporat-
78 ing said company, exempt from taxation within the county of Valencia.

C. N. STERRY.

Subscribed and sworn to before me this 19th day of April, A. D. 1892.

[SEAL.] KARL A. SNYDER,
Notary Public.

That subsequent and on the fourth day of June, 1894, in an action of foreclosure pending in this court, wherein The Mercantile Trust Company was plaintiff and The Atlantic and Pacific Railroad Company was defendant, and in which receivers, who were the predecessors in office of the said C. W. Smith, receiver herein, had been duly appointed, one Solomon Luna, who was then and at that time the duly appointed, acting and qualified collector of said county of Valencia, made and filed a petition in this court, in said cause, with permission of this court, and of which the following is a true and correct copy:

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } *ss*:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising under the Constitution and Laws of the United States.

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
ATLANTIC AND PACIFIC RAILROAD CO., Defendant.

To the Hon. Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, in chancery sitting:

79 *Petition of Solomon Luna.*

Your petitioner, Solomon Luna, sheriff and *ex officio* collector of taxes and licenses for the county of Valencia in the Territory of New Mexico, respectfully shows unto your honor that in accordance with the laws of the Territory of New Mexico in such cases made and provided the taxing office of the county of Valencia aforesaid, did levy and assess the property of the defendant, The Atlantic and Pacific Railroad Company, situated and being in said county, taxes for territorial and county purposes for the year 1892, amounting to the sum of $8,501.24.

Your petitioner further shows unto your honor that in like manner, a tax amounting to the sum of $14,706.16 was levied and assessed upon the property of the Atlantic and Pacific Railroad Company for the year 1893.

Your petitioner further shows unto your honor that at the times prescribed by law in each of the said years, 1892 and 1893, the tax-roll for the county of Valencia aforesaid, duly certified as required by law, was placed in the hands of your petitioner and your petitioner thereby became charged with the duty of collecting from the said Atlantic and Pacific Railroad Company, the taxes so levied and assessed against it, and your petitioner is advised by counsel and believes and therefore charges the fact to be, that the levy and assessment of the said assessment of the said taxes created a lien upon all the property of the said defendant, The Atlantic and Pacific Railroad Company within the county of Valencia aforesaid, prior and superior to all other liens and incumbrances; which lien it was the duty of your petitioner to enforce by seizure of the property of the said defendant, The Atlantic and Pacific Railroad
80 Company, and sale thereof or sufficient amount thereof to satisfy the said taxes, together with interest and penalties which have accrued thereon.

Your petitioner further shows unto your honor that heretofore, to wit: on the — day of April, 189–, your petitioner being then and there about to proceed to the enforcement of the payment of the

said taxes so levied and assessed against the said defendant, The Atlantic and Pacific Railroad Company, the said defendant filed in this honorable court its bill of complaint, seeking to enjoin your petitioner from so enforcing the payment of said taxes, and while the said bill of complaint was pending and undetermined in this honorable court, and before your petitioner was able to proceed in the manner prescribed by law to the enforcement of the payment of said taxes, this proceeding by the Mercantile Trust Company was begun in this honorable court, and J. W. Rhinehart, John J. McCook and Joseph C. Wilson were on the 5th day of January, 1894, appointed by this honorable court, receivers therein, and under and by virtue of such appointment took possession of all of the property of said defendant; and now control and operate the same as such receivers under the orders of this honorable court.

Your petitioner further shows unto your honor that he is advised by counsel and believes and therefore charges the fact to be, that by reason of the appointment of the said receivers in this proceeding, your petitioner is prevented from proceeding in the manner prescribed by law to enforce the collection of the said taxes so levied and assessed against the said defendant, The Atlantic and Pacific Railroad Company, but your petitioner is likewise advised
81 that it is the duty of the said receivers to pay the said taxes out of any moneys in their hands belonging to the said defendant, but nevertheless, the said receivers deny their liability to pay the said taxes so levied and assessed, and have refused and still refuse to pay the same, although thereunto requested by your petitioner.

Your petitioner further shows unto your honor that it is impracticable to file with this petition, a copy of the tax-rolls of the county of Valencia, but your petitioner files herewith extracts therefrom showing the levy and assessment of said taxes against the defendant, The Atlantic and Pacific Railroad Company, and now here offers to produce when and where this honorable court shall direct, the original tax-rolls for the inspection of the said receivers if thereunto required.

Your petitioner shows unto your honor that it is the manifest duty of the said receivers to pay the said taxes so levied and assessed for the years 1892 and 1893, but inasmuch as the said receivers refuse to pay the same, your petitioner is without remedy except in this proceeding.

Wherefore, your petitioner prays that the said receivers may be ordered to pay to your petitioner, all unpaid taxes levied and assessed against the Atlantic and Pacific Railroad Company for the years 1892 and 1893, and that your petitioner may have such other and further relief in the premises as equity may require and to your honor may seem meet.

(Signed) SOLOMON LUNA,
Sheriff and ex Officio Collector of Taxes and Licences,
Valencia County, N. M.

(Signed) NEILL B. FIELD,
Solicitor for Petitioner.

82 TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Solomon Luna being first duly sworn, upon his oath deposes and says: That he has read the foregoing petition and knows the contents thereof; that the allegations therein are true of his own knowledge, except as to so much and such parts thereof as are made upon information and belief; and as to those allegations he believes the same to be true.

(Signed) SOLOMON LUNA.

Subscribed and sworn to before me this 2d day of June, A. D. 1894.

[SEAL.] (Signed) S. BURKHART,
Notary Public.

Filed in my office this 4th day of June, 1894.

O. N. MARRON, *Clerk.*

83

Territory of New Mexico, for 1892.

	City of Albuquerque 12.	City of Albuquerque 26.	Fixed by county.	Fixed by territorial board of equalization.	Final assessed value.	Territorial taxes.					County tax.							City tax.					Cattle indemnity.	Total tax.
						For territorial purposes.	Territorial tuition.	Capitol fund.	Insane asylum.	School tax.	General tax.	County additional.	Int'st funded debt '82, '83.	Interest funded debt '85.	Interest funded debt '89.	Interest current expense bonds.	Road and bridge.	Sinking fund bonds '82.	Unpaid interest, funded debt.				
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4			47,294 41																				
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10																							
11																							
12																							
13					388,184 40	2,523 21	388 18	38 86	19 40	1,164 55	970 46	194 09	560 03	62 10	881 76	116 46	194 09	776 37	601 68				8,501 24
14					388,184 40																		

1893.

	Territorial purposes.	Special debt 4th fiscal yr.	Normal schools.	Normal institute.	Branch agrt. exper. stations.	Casual deficit bonds interest.	Territorial institutions.	Cattle indemnity.	School fund.	General fund.	County additional.	Court fund.	Road and bridge.	Interest bonds '82, '83.	Interest bonds '85.	Interest bonds '89.	Unpaid interest, fund.	Interest current expense bonds.	Sinking fund.				
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27	2,349 84	881 19	176 24	19 58	97 91	97 91	685 37		723 28	979 10	195 82	1,958 20	195 82	881 19	1,253 25	1,762 38	979 10	254 98	1,174 92	14,706 18			
28																							
29																							
30																							
31																							
32																							
33																							
Tot.																							

Dollar, cent and mill ($ c. m.) marks omitted.

1—458

	Name of property-owner.	Precinct No.	Fraction or other description.	Section.	Township.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Addition.	Value of land.	Value of improvements.	Total val. of land & improvements.	Value of cattle.	Value of personal property.	Deductions.
1	Atlantic & Pacific R. R.																	
2	Company																	
3	Granted lands as per																	
4	list on file						157,648 04	.20					$31,529 61		$31,529 61		$2,004 99	
5	Personal property as																	
6	follows:																	
7	Rio Puerco, first																1,888 00	
8	El Rito, second																541 00	
9	Laguna																677 00	
10	Cubero																2,145 00	
11	McCarty's																682 00	
12	Grant's																1,383 00	
13	Bluewater																3,150 00	
14	San Jose																1,316 00	
15	Total value of right of																	
16	way														327,103 00			

1893.

17	Atlantic & Pacific R. R.																	
18	Company																	Paid by co'nty
19	Granted lands as per																	commission'rs
20	list on file						169,167 48	.20					33,833 50				2,004 99	$16,916 75
21			Rio Puerco station										1,888 00					
22			San Jose										541 00					
23			El Rito										677 00					
24			Laguna										2,145 00					
25			Cubero										682 00					
26			McCarty's										1,383 00					
27			Grant's										3,150 00					
28			Bluewater										1,316 00					Final assessed
29			Total value of right of															value.
30			way												327,103 00			$391,640 24
31																		
32																		
33																		
Ttl.																		

THE UNITED STATES TRUST CO. OF NEW YORK ET AL. C.C.U.

85 That thereafterwards and on or about the 14th day of December, A. D. 1894, the said Solomon Luna filed in said cause his amended petition, a true and correct copy of which is as follows:

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising under the Constitution and Laws of the United States.

THE MERCANTILE TRUST COMPANY, Complainant, }
vs. }
THE ATLANTIC AND PACIFIC RAILROAD COMPANY, Defendant. }

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial court thereof, in chancery sitting:

Amended Petition of Solomon Luna.

Solomon Luna, sheriff and *ex officio* collector of taxes and licenses for the county of Valencia, in the Territory of New Mexico, by leave of the court first had and obtained, amends his petition heretofore filed in this cause and reiterating and reaffirming all the allegations of his original petition herein, the said petitioner shows to the court that while it is true that the Atlantic and Pacific Railroad Company, by C. N. Sterry its general attorney, who at that time had charge for said company to look after the assessment and taxation of said company and its property, in the Territory of New Mexico, made and returned to the assessor of Valencia county, Territory of New Mexico,
86 the return set up in the answer of the said receivers herein, a copy of which is attached to and made a part of said answer, marked "Exhibit B," and while it is also true that there was accepted from the return so made to the said assessor the list of the real estate owned by the Atlantic and Pacific Railroad Company in the county of Valencia, Territory of New Mexico, which consisted entirely of the land granted by the Government of the United States to the Atlantic and Pacific Railroad Company, outside of its right of way in said county and Territory; it is also true that within what is described in the said "Exhibit B," as the right of way of the said Atlantic and Pacific Railroad Company, in the county of Valencia, the said company is the owner in fee-simple of a tract of land about 200 feet wide and about 60 miles long, that is to say; that your petitioner is informed and believes that the entire length of the main line of the Atlantic and Pacific Railroad Company in the county of Valencia, is 95.458 miles, and that as to about 33 miles of said length and no more, the lands covered by the said railroad in the said county of Valencia, in said Territory of New Mexico were part of the public domain at the time of the passage of the act incorporating the said railroad company, and as to all of the lands covered by the said railroad, except the said 33 miles,

the same and every part thereof was held in private ownership at the time of the passage of the said act incorporating the said Atlantic and Pacific Railroad Company; and your petitioner is informed and believes that the said Atlantic and Pacific Railroad Company acquired title thereto by gift, purchase or adverse possession under the provision of section 7, of the said act of incorporation, which title your petitioner is informed and believes is and was at the time of the assessment and taxation thereof, an
87 absolute fee-simple title, and the same and all improvements, thereon, are and were at said time, real estate, and subject to taxation as such in the Territory of New Mexico, and that no part thereof was or is exempt from such taxation.

Your petitioner is advised by counsel and believes, and therefore charges the fact to be, that as to so much of the said track of the said Atlantic and Pacific Railroad Company as traversed and crossed what was part of the public domain of the United States, the said Atlantic and Pacific Railroad Company acquired by section 2, of the said act of incorporation, an easement therein, which by the terms of the said act of incorporation was and is exempt from taxation in the Territory of New Mexico, but your petitioner is advised by counsel and believes, and therefore charges the fact to be, that while the said easement so acquired by virtue of the said grant was exempt from taxation in the Territory of New Mexico, the improvements and betterments thereof were and are no part of the said easement, and were not and are not exempt from taxation by the said provision of the said act of incorporation.

Your petitioner is further advised by counsel, and believes and so charges the fact to be, that by the laws of the Territory of New Mexico, the improvements of the said Atlantic and Pacific Railroad Company upon that portion of the public domain over and upon which the said easement was so acquired, are and were subject to taxation in the Territory of New Mexico, and your petitioner charges that the taxes levied and assessed upon the property of the said Atlantic and Pacific Railroad Company, in the county of Valencia, Territory of New Mexico, which your petitioner seeks to have paid in this proceeding, were and are levied upon and assessed
88 against the said property so subject to taxation as aforesaid, and the same were not nor was any part thereof levied or attempted to be assessed against the said easement of the said company which was so exempt by the said terms of the said act of Congress.

Your petitioner further shows unto your honor that the said taxing officers of the said county of Valencia, in the Territory of New Mexico, accepted a description of the said property, and the valuation thereof as fixed by the agents of the said Atlantic and Pacific Railroad Company, although the said description might have been made more definite and certain, and the said valuation was below the actual value of the said property of the said Atlantic and Pacific Railroad Company for the purposes of taxation, and your petitioner is advised that the said Atlantic and Pacific Railroad Company and these receivers are estopped to deny the sufficiency of the said de-

scription or the fairness of the said valuation; and that your petitioner is informed and believes and so charges the fact to be that the value of the road-bed of the said Atlantic and Pacific Railroad Company in the said county of Valencia, to which the company owns a fee-simple title, together with the value of the cuts and fills thereon and the cross-ties, rails, fish-plates, bolts and other improvements thereon, and annexed thereto, together with the improvements of a like nature affixed to the soil and used by the said company in connection with the said easement, is of the value, to wit: of not less than one million dollars, and the amount of taxes sought to be collected in this proceeding is much less than the fair and equitable amount of taxes which should be paid by the said Atlantic and Pacific Railroad Company.

Your petitioner is further advised by counsel that under
89 the provision of the laws of New Mexico in such cases made and provided, he is fully authorized and empowered to correct any mere clerical errors in the entries of said assessment upon the tax-rolls of the county of Valencia; and your petitioner hereby offers if required so to do, to correct any such errors as may be pointed out in the said entries, and your petitioner prays as in his original petition, and will ever pray, etc.

SOLOMON LUNA,
Sheriff and ex Officio Collector of Taxes and Licenses, Valencia County, New Mexico.

NEILL B. FIELD,
Solicitor for Petitioner.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Solomon Luna, being first duly sworn, upon his oath deposes and says, that he has read the foregoing amended petition and knows the contents thereof, that the allegations therein contained are true of his own knowledge, except as to so much and such parts thereof as are made upon information and belief, and as to these allegations he believes the same to be true.

SOLOMON LUNA.

Subscribed and sworn to before me this 13th day of December A. D. 1894.

[SEAL.] FELIX H. LESTER,
Notary Public.

That thereupon the receivers named in said petition filed their certain pleas to said amended complaint, denying the right to recover the taxes so assessed for such year and that said pleas have been set down for argument in said cause, but have not yet
90 been heard or disposed of by the court, and that on the first day of February, A. D. 1896, C. W. Smith, herein was duly appointed successor in office as receiver of the property of the Atlantic and Pacific Railroad Company to the receivers named in said amended petition, and that he, the said C. W. Smith, is now, and

has been, such successor in office in said suit, as well as receiver appointed in the above-entitled cause.

That the said petitions are still pending and undisposed of in this court and involve the taxes sought to be recovered in this action for the years 1892 and 1893, alleged or claimed to be due from the receiver herein and the Atlantic and Pacific Railroad Company, to Valencia county, in the Territory of New Mexico.

That to each of said petitions of the said Solomon Luna there *was* filed by the predecessors in office to the said C. W. Smith, receiver herein, pleas which are still undisposed of in said cause.

That no further or other assessment was ever made, or attempted to be made by any officer or officers in Valencia county, in the Territory of New Mexico, for the year 1892 than that heretofore set forth and stated until in the year 1896, when the tax collector of Valencia county that year claimed and pretended, after receiving the tax-rolls of said county for 1896, to enter up the assessment stated and set forth in paragraphs 1 and 2 of the intervening petition filed herein.

That all of the taxes levied, as alleged in the 1st and 2nd paragraphs of said intervening petition, and claimed to have been levied by the collector or any other officer in the county of Valencia and Territory of New Mexico for the year 1892, against the property of the Atlantic and Pacific Railroad Company, were and are based upon the assessment on the superstructure placed on the right
91 of way of the Atlantic and Pacific railroad, as hereinbefore stated and set forth, and upon no other assessment whatever, and was and is the same assessment made by the assessor in said county, as hereinbefore stated and set forth, save and except only that the assessment alleged in the 1st and 2nd paragraphs of the intervening petition did not pretend to be made upon the actual right of way, but only upon its superstructure.

All of which said several matters and things hereinabove stated and set forth said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company or C. W. Smith, its receiver, for the year 1892, and they and each of them jointly and severally humbly crave the judgment of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

Second Plea.

The United States Trust Company of New York, and C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company for their second plea to the intervening petition filed herein, by protestation,

not confessing or acknowledging all or any part of the matters
92 and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied and assessed for the year 1893 against the Atlantic and Pacific Railroad Company in the sum of $23,064.63, the following facts in bar thereto, and in bar to the right of the Territory of New Mexico to receive and collect said amount or any part thereof, from said receiver.

That some time in the year 1896, the then collector of Valencia county, in the Territory of New Mexico, pretended to make and levy the assessment and taxes pretended to be made and as alleged and shown by the allegations contained in paragraph 3 of the intervening petition, and the said collector was wholly without any authority in law or in equity to make said assessment and said levies by reason of the following facts:

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at the time belonged to the Government of the United States, and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width, under and by virtue of said act of Congress, both through the lands belonging to the United States as well as through the lands belonging to others.

93 That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the rights conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way through Valencia county, in said Territory, 3.433 miles of sidings; making a total amount of trackage in Valencia county in said Territory, in the year 1893, of 95.891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company, under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1893 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and are now stations upon said line of railroad in said county and Territory, named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's, Bluewater.

That upon said right of way and station grounds, prior to 1893, and up to January 1, 1894, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails, sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon
94 bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so imbedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main and side tracks; and that the buildings at the stations, above described, are such as were and are necessary for the operation of such railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That in the year 1893, the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That on and after the first day of March, 1893, and within the time required by law, one Franco Chavez y Armijo, the then duly qualified and acting assessor of Valencia county, Territory of New Mexico, for the year A. D. 1893, pretended and claimed to assess and to enter upon the assessment-roll for said county and Terri-
95 tory for said year, the assessment of all the property of the Atlantic and Pacific Railroad Company in Valencia county, in said Territory, subject to taxation, and for the purpose of making such assessment in conformity with the requirements of law, made and entered upon the assessment-roll for said year, in said county, certain entries relative to the Atlantic and Pacific Railroad Company and its property, both real and personal; a true, perfect, correct and complete copy of said assessment-roll, in so far as it shows any entries for the year 1893, of, or concerning the Atlantic and Pacific Railroad Company or its property, is filed herewith, marked "Receivers' Exhibit No. 5," and the same by reference thereto is made a part of this plea.

That thereupon, the said county assessor, upon a leaf in the assessment-roll opposite to the leaf in said roll containing the assessment

of the Atlantic and Pacific railroad and its property, as shown by Receivers' Exhibit No. 5, entered and extended the various levies of taxes for said county for said year A. D. 1893, against said property and each item thereof; a full, true and complete copy of the taxes levied against the Atlantic and Pacific Railroad Company and its property, and each item thereof, in said county by said assessor, for said year A. D. 1893, as extended by him upon the page of said assessment-roll opposite the page containing the assessment itself, is shown by the paper herewith filed, marked "Receivers' Exhibit No. 6," which by reference thereto is made a part hereof.

That on the 6th day of July, A. D. 1893, the board of county commissioners of Valencia county, Territory of New Mexico, endorsed on the back of the assessment and tax roll so made by said assessor as aforesaid, their approval and warrant to the collector, a true
96 and correct copy of which is shown on the back of the paper marked "Receivers' Exhibit No. 6," and to which reference is hereby made.

That on the 18th day of September, A. D. 1893, the said assessor duly verified his assessment and tax roll, a true copy of which verification is shown endorsed on the back of the paper marked "Receivers' Exhibit No. 6," and made a part hereof by reference thereto.

That on the 18th day of September, 1893, one Solomon Luna, who was then sheriff and *ex officio* collector of taxes for said county, endorsed upon the copy of the assessment-roll and tax-roll on that day delivered to him by the assessor, a receipt, a copy of which is shown by the endorsement on the back of the paper marked "Receivers' Exhibit No. 6," and made a part hereof by reference thereto.

That the assessor, in the year 1893, in accordance with law, made three assessment-rolls, which contained the assessment of the property both real and personal, of Valencia county, in said Territory, for that year, with the taxes levied and extended thereon against each item of property assessed, in the manner shown by the Receivers' Exhibits No. 5 and No. 6; and one of said assessment-rolls was delivered to the territorial auditor, one of said assessment-rolls was retained in the office of the said assessor, and the other of said assessment-rolls was delivered to the said Solomon Luna, sheriff and *ex officio* tax collector as aforesaid. That Receivers' Exhibits No. 5 and No. 6 filed herewith, are copies of that portion of the assessment and tax roll delivered by the assessor of said county to the said Solomon Luna, as said sheriff and *ex officio* collector, and which in anywise described any property belonging to the Atlantic and Pacific Railroad Company, or against which any tax was ex-
97 tended or levied for the year A. D. 1893, and such exhibits show exactly everything that was done in that year in the way of assessing the property of said railroad company, and of levying or extending a tax against the same, as the same appears upon the original assessment-roll in the hands of the said Solomon Luna.

That on or about the 28th day of December, 1893, and on or about the 19th day of May, 1894, the Atlantic and Pacific Railroad

Company paid to the said Solomon Luna, as sheriff and *ex officio* collector of taxes, the sum of $75.28, being the amount of tax levied on the personal property of the Atlantic and Pacific Railroad Company which was assessed on said assessment-roll in the hands of the said Luna, in the column headed "value of personal property," in the sum of $2,004.99, as will appear from said Receivers' Exhibit No. 5.

That there was no personal property of any kind, nature or description belonging to said railroad company in Valencia county, which was subject to taxation in that county for the year A. D. 1893, which was not included in the assessment of $2,004.99 aforesaid, and upon which the said tax of $75.28 was levied and paid.

That on or about the 28th day of December, 1893, and on or about the 19th day of May, 1894, the Atlantic and Pacific Railroad Company paid to the said Solomon Luna, as sheriff and *ex officio* collector of Valencia county, the further sum of $1,905.67, being the tax levied against that portion of its land grant which was and is situated in Valencia county in said Territory, and which, upon said assessment-roll under the head of "Value of land" in the hands of said Solomon Luna, was assessed at the sum of $33,833.50, as appears by reference to said Receivers' Exhibit No. 5; true and correct copies of the receipts given by the said Solomon
98 Luna are filed with these pleas marked Receivers' Exhibits Nos. 7, 8, 9 and 10, and by reference thereto made a part hereof.

Solomon Luna, as such sheriff and *ex officio* tax collector received said assessment-roll, with the taxes extended thereon, and the endorsement shown on the back, which so far as relates to the Atlantic and Pacific Railroad Company or its property, are shown by said Receivers' Exhibits No. 5 and No. 6, and the endorsements on the back thereof.

That no other or further assessment was ever made by any officer of Valencia county in said Territory in the year 1893, of any property belonging to the Atlantic and Pacific Railroad Company other than that shown by Receivers' Exhibit No. 5, and no other or further levy or extension of taxes against such assessment was ever made during said year, for said year or any other year, save and except that shown by Receivers' Exhibit No. 6.

That the assessment and tax rolls of said county and Territory for said year retained by said assessor, and the one sent to the territorial auditor, are substantially duplicates of the one delivered to the said Solomon Luna.

That no person or persons for or on behalf of the Atlantic and Pacific Railroad Company during the year 1893, or at any time since said time, has made any return of any property to the assessor of Valencia county in said Territory, for the purposes of taxation, save and except that there was returned by the proper officers of said railroad company to the assessor of Valencia county after the first of March, 1893, personal property of the value of $2,004.99,

and 169,167.48 acres of land belonging to its land grant, at
99 twenty cents per acre; and that the taxes paid as hereinabove stated and shown by Receivers' Exhibits Nos. 7, 8, 9 and 10, were all the taxes that were levied upon said personal property and said lands so returned as aforesaid.

That the only pretended or claimed levy of taxes against any property of the Atlantic and Pacific Railroad Company for said year remaining unpaid, is that shown to have been extended and levied upon the "right of way" of the Atlantic and Pacific Railroad Company which was and is assessed at the lump sum of $337,103.00, upon the assessment-roll for said year, together with the further sums placed in said assessment-roll in the column headed "Value of personal property" opposite the words contained in the column in said assessment-roll headed "Name of property-owners," save and except as hereinafter stated.

The names and sums referred to are as follows:

Rio Puerco	$1,888 00
San Jose	541 00
El Rito	677 00
Laguna	2,145 00
Cubero	682 00
McCarty's	1,383 00
Grant's	3,150 00
Bluewater	1,316 00

All of which is shown by the said assessment and levy of taxes upon said assessment-roll, as will fully appear by reference to said Receivers' Exhibits No. 5 and No. 6, and the endorsements thereon.

That prior to the first day of June, 1894, the Atlantic and Pacific Railroad Company paid each and every item of taxes assessed and levied against it or its property in said Valencia county, Territory of New Mexico, save and except only that levied against the
100 assessed value of its "right of way," and that levied against the figures set opposite the names of the stations as hereinabove set forth and described:

RECEIVER'S EXHIBIT No. 5.

Assessment-roll for Valencia County, 1893.

	Name of property-owner.	Prec'ct No.	Real estate. Fraction or other description.	Section.	Tp'ship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Value of land.	Val. of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. board equalizat'n.	Final assessed value.
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22	Atlantic & Pacific R. R. Co.																		Rais'd by county commissioners.		
23	Grant'd lands as per list filed						169,167.48	.20				$33,833 50				2,004 99			$16,916 75		
24			Rio Puerco station													1,888 00					
25			San Jose													541 00					
26			El Rito													677 00					
27			Laguna													2,145 00					
28			Cubero													682 00					
29			McCarty's													1,383 00					
30			Grant's													3,150 00					
31			Bluewater													1,316 00					
32			Tot. val. right of way											327,103 00							391,640 24
33																					
34																					

Receiver's Exhibit No. 6

Territory of New Mexico for 1893.

	Territorial tax.								County tax.								City tax.						
	For territorial purposes.	Special deficit 44th fiscal year.	Normal schools.	Normal institutes.	Branch agricultural experiment station.	Casual deficit bonds, interest.	Territorial institutions.	Cattle indemnity.	School.	General.	Court fund.	County additional fund.	Road and bridge fund.	Interest, '82 & '83.	Interest, 1885.	Interest, 1885.	Unpaid interest.	Interest, current exp'nse bonds.	Sinking fund.	Total.	Amount due January 1st, 1894.	Amount due July 1st, 1894.	Penalty.	Total tax.
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32	2,349 84	881 19	176 24	19 58	97 91	97 91	685 37	.....	783 28	979 10	1,958 20	195 82	195 82	881 19	1,253 25	1,762 38	979 10	234 98	1,174 92	.....	7,353 09	7,353 09	.....	.....
33																								
34																								

Dollar, cent, and mill ($ c. m.) marks omitted.

103 *Oath of Assessor.*

I, Franco Chavez y Armijo, assessor of the county of Valencia, Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment, I have made diligent inquiry and examination to ascertain all the property within said county, subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value, and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the Territory, and that I have not imposed any unjust assessment through malice or ill will, nor allowed any one to escape a just and equal assessment through favor or reward, so help me God.

FRANCO CHAVEZ Y ARMIJO.

Sworn to and subscribed before me this 18th day of September, A. D. 1893.

M. LUNA,
Probate Clerk, etc.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

OFFICE OF BOARD OF COUNTY COMMISSIONERS.

At a regular session, held on the 6th day of July, A. D. 1893.

It is ordered by the board of county commissioners of said county: That the preceding assessment-roll, and each and every assessment therein contained, as originally returned and assessed or as shown therein to have been revised and corrected by the board, be and the same is hereby approved.

104 And that a tax of 1.73 of one per cent. for county purposes, and of two mills on the dollar for school purposes, and of .05 mills on the dollar for court fund, and 1.10 per cent. for various territorial funds, to wit:

Fifty-one hundredths mills for cattle indemnity fund; for territorial purposes, 6 mills on the dollar; for special deficit levy for 44th fiscal year, 2.25 mills on the dollar; for normal school fund, $\frac{45}{100}$ mills on the dollar; for normal school institutes fund, $\frac{5}{100}$ mills on the dollar; for branch agricultural experiment stations fund, $\frac{25}{100}$ mills on the dollar; for casual deficit bonds interest fund, $\frac{25}{100}$ mills on the dollar; for territorial institutions fund, 1.75 mills on the dollar; for cattle indemnity fund on the appraised value of cattle, $\frac{50}{100}$ mills on the dollar, is hereby levied upon all the property therein returned assessed liable to taxation.

And it is further ordered that the county assessor extend the several said rates of taxes upon the tax-roll for the year 1893, and that upon the delivery of the tax-roll to the county collector the clerk of this board shall charge said collector with the aggregate amount of said taxes as provided by law:

To the sheriff and *ex officio* collector of Valencia county, in said Territory, Greeting:

You are hereby commanded, in accordance with the laws of said Territory, in such cases made and provided, to collect all the territorial, county, school, city and all other taxes above enumerated and specified, levied on the citizens of said county, and non-resident owners, whose property may have been assessed in your county, and all taxes assessed upon property within your county as appears from the tax-list of said county for the year 1893, being the foregoing tax-list, and the delinquent tax-lists of said county for the previous years, and also that you collect all interest due on
105 delinquent taxes as provided by the laws of said Territory.

In witness whereof we have hereunto set our hands and caused the seal of said board to be hereunto affixed, attested by the clerk of said board, this 6th day of July, A. D. 1893.

CARLOS BACA, *Chairman of Board.*
MANUEL S. SANCHEZ, *Commissioner.*

Attest: M. LUNA,
Probate Clerk and ex Officio Clerk of the Board of County Commissioners.

N. M., A. D. 189–.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Received of Maximiliano Luna, probate clerk and *ex officio* clerk of the board of county commissioners of said county, the tax-lists or assessment-rolls of said county for the year 1893, which amount to $63,035.89 territorial, school and county funds, viz:

For territorial purposes	$10,698 80
" special deficit levy for 44th fiscal year	4,012 80
" normal school fund	802 60
" normal school institutes fund	88 96
" branch agricultural experimental stations fund	446 13
" casual deficit bonds interest fund	446 13
" territorial institutions fund	3,121 13
" cattle indemnity fund	79 52
" school fund	3,566 63
" general fund	4,459 27
For court fund	8,917 36
106 " county additional fund	892 32
" road and bridge fund	892 32
For interest on bonds 1882 and 1883	4,012 80
" " " 1885	5,706 51
" " " 1889	8,025 16
" unpaid interest fund	446 13
" interest on current expense bond fund	1,070 35
" sinking fund	5,350 70

Witness my hand this 18th day of September, A. D. 1893.

SOLOMON LUNA,
Sheriff and ex Officio Collector in and for said County.

107 RECEIVER'S EXHIBIT No. 7.

(513.)

Auditor's No. 2675, series 10.
Recorded in January, 1894.

Atlantic and Pacific Railroad Company (Western division) to Solomon Luna, sheriff and collector, Dr.

Los Lunas, Valencia Co., N. M.

1893.

Dec.	28	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, N. M., on the personal property of said company, for the first half of the year 1893, as follows:		
		Valuation, $2,004.99, at $3.755 per $100.00.	$75 28	
		First installment, ½	.....	$37 64

Examined by— D. E. S. Correct: —— ——. Approved: —— ——.

Approved: KARL A. SNYDER, *For General Attorney.*
Approved: T. R. GABEL, *General Superintendent.*
Approved: W. E. WALSH, *Auditor.*

Division.	Acc't No.	Passenger.	Freight.	Common.
Taxes ..	....	....	....	$37 64
.....	....	....	....	.....
.....	....	....	....	.....
.....	....	....	....	.....
.....	....	....	....	.....
.....	....	....	....	.....

$37.64.

Received ——, 189–, from the Atlantic and Pacific Railroad Company thirty-seven and $\frac{64}{100}$ dollars, in full payment of above amount.

SOLOMON LUNA, *Sheriff.*

108 RECEIVER'S EXHIBIT No. 8.

No. 309. Tax-roll 189-.
Precinct No. —. Page No. —.

Tax Receipt.

Office of sheriff and *ex officio* collector, Valencia county, N. M.

LOS LUNAS, NEW MEXICO, *Jan. 29th*, 1894.

Received from Atlantic and Pacific R. R. Co. nine hundred and fifty-two $\frac{84}{100}$ dollars, in payment of one-half of taxes levied in the year 1893, delinquent January 1, 1894, on the following-described property, to wit:

Distribution.	Description of real estate.
Territorial purposes	Granted lands as per list filed.
Special deficit 44th fiscal year	169,167.48 acres at 30c. per acre, $50,750.25.
Normal schools	
Normal institutes	
Branch agricultural experiment stations	
Casual deficit bond interest	
Territorial institutions	
Cattle indemnity fund	
Taos County sub-agricultural experiment station	
School fund	
General fund	
Court fund	
County additional fund	
Roads and bridges fund	
Interest on bonds 1882-'3	
Interest on bonds 1885	
Interest on bonds 1889	Real-estate valuation.
Unpaid interest fund	Personal property.
Interest on general expense bonds	Valuation.
Sinking fund	Total.
Penalty	Exemption.
Total $952 84	Subject to tax.

Value of cattle $—.

SOLOMON LUNA,
Sheriff and ex Officio Collector,
Per —— ——, *Deputy.*

109 RECEIVER'S EXHIBIT No. 9.

Triplicate.

Auditor's No. 2579, series 10.
Recorded in May, 1894.

Atlantic and Pacific Railroad Company (Western division) to Solomon Luna, sheriff and collector, Dr.

1894. Los Lunas, N. M.

May	19	To amount of taxes claimed to be due and payable to tax collector of Valencia county, New Mexico, from the Atlantic & Pacific Railroad Company, for the second half of the year 1893, upon the land grant in said county, as follows:		
		119,867.48 acres at 30c.....$50,750 25		
		Tax at 3.755 per $100.00	$1,905 67	
		Second installment.....	.....	$952 83

Examined by— D. E. S. Correct: — —. Approved: — —.

Approved: KARL A. SNYDER, *For General Attorney.* Approved: T. R. GABEL, *General Superintendent.* Approved: W. E. WALSH, *Auditor.*

Division.	Acc't No.	Passenger.	Freight.	Common.
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
Transfers Boston office.....				
.....	.....	.....	.....	....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

Received July 10, 1892, from Atlantic & Pacific Railroad Company nine hundred and fifty-two and $\frac{83}{100}$ dollars, in full payment of above account.

SOLOMON LUNA,
Sheriff and Collector.

$952.83.

110 RECEIVER'S EXHIBIT No. 10.

(307.)

Original.

Auditor's No. 3577, series —.
Recorded in May, 1894.

Atlantic & Pacific Railroad Company (Western division) to Solomon Luna, sheriff and collector, Dr.

1894. Los Lunas, Valencia Co., N. M.

May	19	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, N. M., upon the personal property of said company, in said county, for the second half of the year 1893, as follows:		
		Valuation, $2,004.99, tax at 3.755 per $100.00.....	$75 28	
		Second installment, ½.....	.....	$37 64

Examined by— — —. Correct: — —. Approved: — —.

Approved: KARL A. SNYDER, *For General Att'y.* Approved: J. T. E. PHILLIPS, *For Auditor.* Approved: T. R. GABEL, *General Superintendent.*

Charge to account.		
No.	Letter.	Amount.
Taxes	.....	$37 64
.....	.....	.....
.....	.....	.....
.....	.....	.....
....	.....	.....
Common .	.....	$37 64

Received July 10, 1894, from Atlantic & Pacific Railroad Company thirty-seven $\frac{64}{100}$ dollars, in full payment of above account.
(Signed in duplicate.)

SOLOMON LUNA,
Sheriff and Collector.

111 That the assessment and all of the proceedings had to charge said property with the taxes levied in 1893 are fully shown by Exhibits 5 and 6 hereto attached and made part of this plea by reference thereto.

That the property assessed by the said collector in the year 1896 was and is the same property so assessed by the said assessor for said county in the year 1893, as aforesaid, except as hereafter stated, and that the said taxes claimed by said intervening petition in the sum of $23,064.63 was pretended to be assessed by the collector in the allegations contained in the third paragraph of the intervening petition, as a tax levied and assessed upon the superstructure of the right of way and station grounds of the Atlantic and Pacific railroad, as hereinabove in this plea stated and set forth, and upon no other property whatsoever.

That about the 14th day of December, 1894, Solomon Luna, tax collector of Valencia county, in the Territory of New Mexico, filed an amended intervening petition in the foreclosure suit in this court then and now pending, wherein The Mercantile Trust Company of New York was plaintiff and The Atlantic and Pacific Railroad Company was defendant, and wherein the predecessors in office of the said C. W. Smith, receiver, were appointed receivers, seeking to recover the taxes in the intervening petition filed by the Territory of New Mexico, sought to be recovered in the allegations set forth and contained in the third paragraph of said intervening petition; a copy of said amended petition is set forth in the first plea herein, and by reference thereto is made a part hereof.

That thereupon the receivers named in said petition filed their certain pleas to said amended petition, denying the right to
112 recover the taxes so assessed for such year and that said pleas have been set down for argument in said cause, but have not yet been heard or disposed of by the court, and that on the first day of February, A. D. 1896, C. W. Smith, herein was duly appointed successor in office as receiver of the property of the Atlantic and Pacific Railroad Company to the receivers named in said amended petition, and that he, the said C. W. Smith, is now, and has been such successor in office in said suit, as well as receiver appointed in the above-entitled cause.

That the said petitions are still pending and undisposed of in this court and involve the taxes sought to be recovered in this action for

the years 1892 and 1893, alleged or claimed to be due from the receiver herein and the Atlantic and Pacific Railroad Company to Valencia county in the Territory of New Mexico.

That to each of said petitions of the said Solomon Luna there *was* filed by the predecessors in office to the said C. W. Smith, receiver herein, pleas which are still undisposed of in said cause.

That no further or other assessment was ever made, or attempted to be made by any officer or officers in Valencia county in the Territory of New Mexico for the year 1893 than that heretofore set forth and stated, until in the year 1896, when the tax collector of Valencia county that year claimed or pretended, after receiving the tax-rolls of said county for 1896, to enter up the assessment stated and set forth in paragraph 3 of the intervening petition filed herein.

That all of the taxes levied, as alleged in the third paragraph of said intervening petition, and claimed to have been levied by the collector or any other officer in the county of Valencia, and
113 Territory of New Mexico, for the year 1893, against the property of the Atlantic and Pacific Railroad Company, were and are based upon the assessment of the superstructure placed on the right of way and station grounds of the Atlantic and Pacific railroad, as hereinbefore stated and set forth, and upon no other assessment whatever, and was and is the same assessment made by the assessor in said county, as hereinbefore stated and set forth, save and except only that the assessment alleged in the third paragraph of the intervening petition did not pretend to be made upon the actual right of way, but only upon its superstructure.

All of which said several matters and things hereinabove stated and set forth, said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company or C. W. Smith, its receiver, for the year 1892, and they each of them jointly and severally humbly crave the judgment of this court whether they be compelled to make any other or further answer to said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitor and Counsel for Each of the Defendants Joining Herein.

Third Plea.

The United States Trust Company of New York, and C. W. Smith' the receiver of the Atlantic and Pacific Railroad Company
114 for their third plea to the intervening petition filed herein, by protestation, not confessing or acknowledging all or any part of the matters and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of

taxes alleged to have been levied and assessed for the year 1894 against the Atlantic and Pacific Railroad Company in the sum of $23,020.16, the following facts in bar thereto and in bar to the right of the Territory of New Mexico, to receive and collect said amount or any part thereof, from said receiver.

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at that time belonged to the Government of the United States and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width, under and by virtue of said act of Congress, both through the lands belonging to the United States as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right
115 conferred upon it by said act of Congress. That the balance of said right of way was and is, over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way, through Valencia county, in said Territory, 3.433 miles of sidings; making a total amount of trackage in Valencia county in said Territory in the year 1892 of 96.891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1894 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and are now stations upon said line of railroad is said county and Territory, named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's, Bluewater.

That upon said right of way and station grounds, prior to 1892, and up to January 4, 1893, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon, bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for

its tracks and side tracks, which was and is built in a permanent
116 manner, and that the ties for its tracks were and are firmly embedded in this grade which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That in the year 1894 the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land, which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That some time in the year 1896, the then collector of Valencia county, in the Territory of New Mexico pretended to make and levy the assessment and taxes pretended to be made and as alleged and shown by the allegations contained in paragraph 4 of the intervening petition, and the said collector was wholly without any authority in law or in equity to make said assessment and said levies by reason of the foregoing and following facts:

That some time in the year 1894, and after the first day of
117 March, A. D. 1894, the exact date of which these defendants are unable to state, the duly appointed, qualified and acting assessor of Valencia county, in the Territory of New Mexico, made and entered upon his books an assessment, in the words and figures following to wit:

"1894.

Atlantic and Pacific Railroad Company:

Lands as per itemized list, 93.458 miles.
Main track at $6,500.00.
Rio Puerco station.
San Jose "
El Rito "
Laguna "
Cubero "
McCarty's "
Grant's "
Bluewater "
No. of acres, 169,167.48 at 20c.
Value of land, $33,833.00.
Value of personal property, $2,004.99."

That thereafterwards on that assessment being returned, the board of county commissioners of said county in session as a board of equalization, raised said assessment so made by the assessor and made the assessment of which the following is a true and correct copy:

"Fixed by county commissioners:

$84,583.74.		
$607,477.00.		
$2,289.00	Rio Puerco	station.
$541.00	San Jose	"
$842.00	El Rito	"
$4,025.00	Laguna	"
$700.00	Cubero	"
$1,045.00	McCarty's	"
118 $3,150.00	Grant's	"
$4,757.00	Bluewater	"

Final assessed value, $711,414.73."

That thereafterwards in conformity to the provisions of the laws of the Territory of New Mexico, there *was* levied against the assessment so made by the assessor, by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $26,144.46.

That of the taxes so levied, the predecessors in office of the said C. W. Smith, receiver, paid all the taxes assessed by the assessor of the personal property so assessed, as shown hereinabove and paid the taxes levied upon the assessment of the 169,167.48 acres of land assessed by said assessor, but refused to pay the balance of the taxes because of the fact that the assessment as made by said assessor and increased by said board of equalization, was an assessment of the right of way and station grounds of the Atlantic and Pacific railroad, which were and are exempt under the act of Congress creating said railroad company, and that thereupon and thereafterwards and at a date unknown to these defendants, but during the year 1896, the tax collector for said county made the assessment levied and set forth in the fourth paragraph of the intervening petition, which said assessment was and is an assessment upon the superstructure on the right of way of the Atlantic and Pacific Railroad Company and the station grounds appurtenant thereto, and upon no other property of any kind or description, all of which articles so assessed were, are and always have been since the construction of the said railroad, a part of the said right of way and station grounds,
and that no other property of any kind or description en-
119 tered into said assessment, and that the property so assessed
has been fully hereinbefore and above set forth and described.

All of which said several matters and things hereinabove stated and set forth said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover

for taxes alleged to be due from either the Atlantic and Pacific Railroad Company, or C. W. Smith, its receiver, for the year 1894, and they each of them jointly and severally humbly crave the judgment of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

Fourth Plea.

The United States Trust Company of New York, and C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, for their fourth plea to the intervening petition filed herein, by protestation, not confessing or acknowledging all or any part of the matters and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied and assessed for the year 1895 against the Atlantic and Pacific Railroad Company in the sum of $23,020.16, the fol-
120 lowing facts in bar thereto and in bar to the right of the Territory of New Mexico to receive and collect said amount or any part thereof, from said receiver:

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at that time belonged to the Government of the United States and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width under and by virtue of said act of Congress, both through the lands belonging to the United States, as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way, through Valencia county, in said Territory, 3.433 miles of sidings; making a total amount of trackage in Valencia county in said Territory in the year 1892 of 96.891 miles; all of
121 which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the

Atlantic and Pacific Railroad Company in 1895 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been, and are now stations upon said line of railroad in said county and Territory named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's, Bluewater.

That upon said right of way and station grounds, prior to 1892, and up to January 4, 1893, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon, bridges and culverts of iron, stone, and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and main-
122 tained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That in the year 1895 the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land, which it then claimed belonged to it as a part of the land granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That some time in the year 1896, the then collector of Valencia county, in the Territory of New Mexico, pretended to make and levy the assessment and taxes pretended to be made and as alleged and shown by the allegations contained in paragraph 5 of the intervening petition, and the said collector was wholly without any authority in law or in equity to make said assessment and said levies by reason of the foregoing and following facts:

That some time in the year 1895, and after the first day of March, A. D., 1895, the exact date of which these defendants are unable to state, the duly appointed qualified and acting assessor of Valencia county, in the Territory of New Mexico, made and entered upon his books an assessment in the words and figures following, to wit:

"1895.

"Atlantic and Pacific Railroad Company.

"Section tools and miscellaneous property, office, station and telegraph furniture, personal property of the A. and P. R. R. Co., Jno. J. McCook, A. F. Walker, and J. C. Wilson, receivers. Fixed by assessor.

123 "Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turn-tables, side tracks, buildings and entire superstructure on right of way, 93.7 miles in Valencia county at $6,500.00 per mile. Land as per specified list. No of acres 265,361.91 at 20 cents per acre. Value of land, $53,072.38. Value of personal property, $609,050.00. Fixed by county commissioners, $79,608.57. Final assessed value, $690,663.56."

That thereafterwards in conformity to the provisions of the laws of the Territory of New Mexico, there *was* levied against the assessment so made by the assessor, by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $25,381.84.

That of the taxes so levied, the predecessors in office of the said C. W. Smith, receiver, paid all the taxes assessed by the assessor of the personal property so assessed, as shown hereinabove and paid the taxes levied upon the assessment of the 265,361.91 acres of land assessed by said assessor, but refused to pay the balance of the taxes because of the fact that the assessment as made by said assessor, was an assessment of the right of way and station grounds of the Atlantic and Pacific railroad, which were and are exempt under the act of Congress creating said railroad company, and that thereupon and that thereafterwards, and at a date unknown to these defendants, but during the year 1896, the tax collector for said county made the assessment levied and set forth in the fifth paragraph of the intervening petition which said assessment was and is an assessment upon the superstructure on the right of way of the Atlantic and Pacific Railroad Company, and the station grounds appurtenant thereto, and upon no other property of any kind or descrip-

124 tion, all of which articles so assessed were, are, and always have been since the construction of the said railroad a part of the said right of way and station grounds, and that no other property of any kind or description entered into said assessment, and that the property so assessed has been fully hereinbefore and above set forth and described.

All of which said several matters and things hereinabove stated and set forth said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company, or C. W. Smith, its receiver, for the year 1895, and they each of them jointly and severally humbly crave the judgment

of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

Fifth Plea.

The United States Trust Company of New York, and C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, for their fifth plea to the intervening petition filed herein, by protestation, not confessing or acknowledging all or any part of the matters and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and al-
125 leged, do plead thereto in relation to the amount of taxes alleged to have been levied and assessed for the year 1896 against the Atlantic and Pacific Railroad Company in the sum of $24,272.96, the following facts in bar thereto and in bar of the right of the Territory of New Mexico to receive and collect said amount or any part thereof, from said receiver.

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1855, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at that time belonged to the Government of the United States and over upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width under and by virtue of said act of Congress, both through the lands belonging to the United States, as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on
126 said right of way through Valencia county, in said Territory, 3.433 miles of sidings; making a total amount of trackage in Valencia county in said Territory, in the year 1892, of 96.891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1896 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds

for station buildings, work shops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and are now stations upon said line of railroad in said county and Territory, named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's ,Grant's Bluewater.

That upon said right of way and station grounds, prior to 1892, and up to January 4, 1893, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails, sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade, so
127 that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations, above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That in the year 1896 the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That some time in the year 1896 the then collector of Valencia county, in the Territory of New Mexico, pretended to make and levy the assessment and taxes pretended to be made and as alleged and shown by the allegations contained in paragraph 6 of the intervening petition, and the said collector was wholly without any authority in law or in equity to make said assessment and said levies by reason of the foregoing and following facts:

That some time in the year 1896, and after the first day of March, A. D. 1896, the exact date of which these defendants are unable to state, the duly appointed, qualified and acting assessor of Valencia county, in the Territory of New Mexico, made and entered upon his assessment book an assessment in the words and figures following, to wit:

128 "1896.

Atlantic and Pacific Railroad Company.

Section tools and miscellaneous property, value of personal property $315.99.

Office, station and telegraph furniture, value of personal property $1,689.00.

Personal property of the A. and P. R. R. Co., C. W. Smith, receiver, taxed by assessor:

Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turntables, side tracks, buildings and entire superstructure on right of way 93.7 miles in Valencia county at $6,500.00 per mile.

Lands as per list attached to return, amount of acres 253,423.21 at 20c.

Total value of land improvements, $50,684.64.

Value of personal property, $609,050.

Fixed by assessor, $126,711.60."

That thereafterwards on that assessment being returned, the board of county commissioners of said county, in session as a board of equalization, changed said assessment so made by the assessor and fixed the value of land at $76,026.96, as follows:

Fixed by county commissioners $76,026.96.

Final assessed value, { $2,004.99. $609,050.00. $76,026.96.

That thereafterwards, in conformity to the provisions — the laws of the Territory of New Mexico, there *was* levied against the assessment, so made by the assessor, by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $26,624.41.

That of the taxes so levied, the said C. W. Smith, receiver,
129 paid all the taxes assessed by the assessor of the personal property so assessed, as shown hereinabove, and paid the taxes levied upon the assessment of the 253,423.21 acres of land assessed by said assessor, but refused to pay the balance of the taxes because of the fact that the assessment as made by the assessor was an assessment of the right of way and station grounds of the Atlantic and Pacific railroad, which were and are exempt under the act of Congress creating said railroad company, and that thereupon and thereafterwards and at a date unknown to these defendants, but during the year 1896, the tax collector for said county made the assessment levied and set forth in the fourth paragraph of the intervening petition, which said assessment was and is an assessment upon the superstructure on the right of way of the Atlantic and Pacific Railroad Company and the station grounds appurtenant thereto, and upon no other property of any kind or description, all of which articles so assessed were, are and always have been since the construction of the said railroad a part of the said right of way and station grounds, and that no other property of

any kind or description entered into said assessment, and that the property so assessed has been fully hereinbefore and above set forth and described.

All of which said several matters and things hereinabove stated and set forth, said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company or C. W. Smith, its receiver, for the year 1896, and they each of them jointly and severally humbly crave the
130 judgment of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

And thereafter, on to wit, the 23rd day of June, A. D., 1897, the same being in vacation, there was entered of record a decree dismissing intervening petition of Territory for Valencia County taxes, and order allowing appeal, which said decree is in the words and figures following, to wit:

In the District Court, Second Judicial District, Territory of New Mexico.

UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*

In the matter of the intervening petition of the Territory of New Mexico filed in the above-entitled cause.

The said matter coming on to be heard upon the question of the sufficiency of the joint and several pleas of the United States Trust Company and Charles W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, to the said intervening petition, for the collection of taxes alleged to be due in Valencia county, after hearing F. W. Clancy for the said intervening petitioner and Karl A. Snyder, Esq., on behalf of the said trust company and the said receiver, the court, being sufficiently advised in the premises finds that it is neither necessary nor proper to pass upon the question of the sufficiency of said pleas for the reason that the said intervening petition and matters and things therein
131 set up fall within the decision of the supreme court of New Mexico in the matter of a like intervening petition in this cause, rendered on the 18th of December, 1896, and are therefore not sufficient to entitle the said intervening petitioner to the relief sought by its petition, and that this petition ought to be dismissed.

It is therefore ordered, adjudged and decreed, that the said intervening petition be and the same hereby is dismissed. And thereupon

the said intervening petitioner prays the court for an appeal to the supreme court of the Territory of New Mexico from the order and decree of this court. It is therefore ordered by the court that the said intervening petitioner be and it hereby is allowed an appeal from the said order and decree of this court to the supreme court of the Territory of New Mexico.

(Signed) N. C. COLLIER, *Judge.*

TERRITORY OF NEW MEXICO, *Second Judicial District Court,* } ss:

I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the above and foregoing is a true, correct and complete transcript of such part of the record and proceedings had in the matter of the intervening petition of the Territory of New Mexico in a cause pending in said court entitled The United States Trust Company of New York against The Atlantic and Pacific Railroad Company and others, No. 1122 as the appellant deems necessary for a review of the decree, according to the direction of its solicitor.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court this third day of July, A. D., 1897.

[SEAL.] O. N. MARRON, *Clerk.*

132 And afterwards, to wit, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors is in the words and figures following, to wit:

In the Supreme *Supreme* Court of the Territory of New Mexico, July Term, 1897.

TERRITORY OF NEW MEXICO, Appellant, *vs.* UNITED STATES TRUST COMPANY OF NEW York and Charles A. Smith, Receiver of Atlantic & Pacific Railroad Company.	No. 733. Appeal from Second Judicial District Court.

Now comes The Territory of New Mexico, appellant, and makes the following assignment of errors in the above-entitled cause and alleges said grounds of error as reasons why the decree rendered therein should be reversed:

1. That the court erred in holding that appellant's intervening petition and the matters and things therein set up are and were not sufficient to entitle appellant to the relief sought by its petition.

2. That the court erred in refusing to grant appellant the relief sought by and claimed in said intervening petition.

133 3. That the court erred in dismissing said intervening petition.

ALBERT B. FALL,
Solicitor General of New Mexico.

F. W. CLANCY, *Of Counsel.*

Endorsement: No. 733. In the supreme court, July term, 1897. Territory of New Mexico, appellant, *vs.* United States Trust Company of N. Y. *et al.* Assignment of errors. Filed in my office this Aug. 3rd, 1897. Geo. L. Wyllys, clerk. Albert B. Fall, solicitor general; F. W. Clancy, att'ys for appellant.

134 And afterwards, to wit, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico on the 12th day of August, A. D. 1897, an assignment of errors; which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

TERRITORY OF NEW MEXICO, Appellant, *vs.* UNITED STATES TRUST COMPANY OF NEW YORK and Charles A. Smith, Receiver of Atlantic & Pacific Railroad Company.	Appeal from the Second Judicial District.

Now comes the said appellant, by its solicitor, and says to the court here that there is manifest error in the record and decree in this cause, and assigns for error that the court below erred in dismissing the intervening petition of the appellant. Wherefore appellant prays that the decree of the court below may be reversed, vacated, and set aside, and that a decree be entered herein as to this court may seem proper and according to law.

F. W. CLANCY,
Solicitor for Appellant.

135 Endorsement: No. 733. In the supreme court, Territory of New Mexico. Territory of New Mexico, appellant, *vs.* United States Trust Company of New York *et al.*, appellees. Assignment of errors. Filed in my office this Aug. 12th, 1897. Geo. L. Wyllys, clerk.

And afterwards, to wit, on the 20th day of August, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion for leave to file addition to record; which said motion is in the words and figures following, to wit:

In Supreme Court, Territory of New Mexico, July Term, 1897.

TERRITORY OF NEW MEXICO *vs.* UNITED STATES TRUST COMPANY OF NEW YORK *et al.*	733.

Now comes said appellant, Territory of New Mexico, by its solicitor, and shows to the court here that there was, in making up the record herein, accidentally omitted from said record certain
136 copies of additional assessments which were a part of the intervening petition of said appellant, and appellant now

produces in court a copy of said copies, duly certified by the clerk of the court below, and moves the court for leave to file said certified copy as an addition to and part of the record herein.

F. W. CLANCY,
Solicitor for Appellant.

Endorsement: No. 733. In the supreme court, Territory of New Mexico. Territory of New Mexico, appellant, *vs.* United States Trust Company of New York *et al.*, appellees. Motion for leave to file addition to record. Filed in my office this Aug. 20th, 1897. Geo. L. Wyllys, clerk.

And afterwards, to wit, on the said 20th day of August, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of govern-
137 ment of said Territory, on July the 26th, A. D. 1897, and on the twenty-third day of said term of said supreme court, the same being Friday, August 20th, 1897, the following, among other, proceedings were had, to wit:

TERRITORY OF NEW MEXICO, Appellant, *vs.* UNITED STATES TRUST COMPANY OF NEW YORK *et al.*	733. Appeal from Bernalillo County.

Now comes said appellant, Territory of New Mexico, by its solicitor, and shows to the court here that there was, in making up the record herein, accidentally omitted from said record certain copies of additional assessments which were a part of the intervening petition of said appellant, and appellant now produces in court a copy of said copies, duly certified by the clerk of the court below, and moves the court for leave to file said certified copies — an addition to and part of the record herein; and said appellees appearing in court by their counsel, Karl A. Snyder, Esq., and not resisting said motion, the court, being sufficiently advised in the premises, grants the same. It is therefore ordered by the court that leave be, and it hereby is, given to appellant to file the said certified copy as an addition to and part of the record herein.

138 And thereafter, on, to wit, August 20th, 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an addition to record; which said addition to record is in the words and figures following, to wit:

Additional Assessment for the Year Eighteen Hundred and Ninety-two.

The following was omitted in the assessment of the year 1892, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic & Pacific Railroad Company in said county
139 of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550

Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station.....	1,800
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station.....	540
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	600
Station-houses, depots, switches, water tanks, and all other improvements at La Guna station.....	2,100
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station.....	600
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,300
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station.....	3,100
Station-houses, depots, switches, water tanks, and all other improvements a- Blue Water station.....	1,300
	$11,340

140 *Additional Assessment for the Year Eighteen Hundred and Ninety-three.*

The following was omitted in the assessment of the year 1893, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvementss" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvement" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile $394,550

141 Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station..... $1,800
Station-houses, depots, switches, water tanks, and all other improvements at San José station..... 540
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station..... 600
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station 2,100
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station..... 600
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station..... 1,300
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station 3,100
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station..... 1,300

$11,340

Additional Assessment for the Year Eighteen Hundred and Ninety-four.

The following was omitted in the assessment of the year 1894, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued,
142 and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550

Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station	$2,289
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station	541
143 Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	842
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station	4,025
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station	700
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,045
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station	3,150
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station	4,757
	$17,349

Additional Assessment for the Year Eighteen Hundred and Ninety-five.

The following was omitted in the assessment of the year 1895, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land	
144 embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile	$214,550
Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile	$394,550
Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station	$2,289
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station	541
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	842
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station	4,025

Station-houses, depots, switches, water tanks, and all other improvements at Cubero station	700
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,045
Station-houses, depots, switches, water tanks, and all all other improvements at Grant's station	3,150
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station	4,757
	$17,349

Additional Assessment for the Year Eighteen Hundred and Ninety-six.

The following was omitted in the assessment of the year 1896, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile	$214,500
Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile	$394,550
Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station	$2,289
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station	541
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	842
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station	4,025
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station	700
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,045
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station	3,150
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station	4,757
	$17,349

TERRITORY OF NEW MEXICO, }
Second Judicial District. }

I, the undersigned, clerk of the district court of said second judicial district, do hereby certify that the above and foregoing five pages contain a true, correct, and complete copy of the copies of additional assessments which were attached to and made a part of the intervening petition of the Territory of New Mexico as to Valencia County taxes, which was filed in my office on the 10th day of June, 1897, in that certain cause wherein United States Trust Company of New York was complainant and Atlantic and Pacific Railroad Company and others were defendants, said intervening petition being the same as to which a decree of dismissal was entered in said district court on the 23rd day of June, 1897, from which decree an appeal has been taken to the supreme court of the Territory of New Mexico.

In witness whereof I hereunto set my hand and affix the seal of said court this 19th day of August, A. D. 1897.

[SEAL.] O. N. MARRON, *Clerk.*

148 Endorsement: No. 733. In the supreme court, Territory of New Mexico. Territory of New Mexico *vs.* United States Trust Co. *et al.* Addition to record. Filed in my office this Aug. 20th, 1897. Geo. L. Wyllys, clerk.

And thereafter, to wit, on the 20th day of August, A. D. 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion for affirmance of judgment; which said motion is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO, Appellant,
vs.
UNITED STATES TRUST COMPANY *et al.*, Appellees. } No. 733.

Notice of Motion to Affirm Judgment.

To F. W. Clancy, Esq., solicitor for appellant:

149 You are hereby notified that the above-named appellees will, at the court-house, in Santa Fé, N. M., on Thursday, August 19th, 1897, at the hour of nine o'clock a. m., or as soon thereafter as counsel can be heard, present to the supreme court of New Mexico the annexed motion for affirmance of the judgment of the court below in the above-entitled cause; at which time and place you are notified to be present and make such objection as you may have to the granting of said motion.

C. N. STERRY,
KARL A. SNYDER,
Solicitors for Appellees.

Albuquerque, N. M., August 16th, 1897.

In the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO, Appellant,
vs.
UNITED STATES TRUST COMPANY OF NEW YORK and C. W. Smith, Receiver of Atlantic & Pacific Railroad Company, Appellees. } No. 733.

Motion for Affirmance of Judgment.

Come now the above-named appellees, by their solicitors, C. N. Sterry and Karl A. Snyder, and move this court to affirm the judgment and decree of the court below dismissing the petition of the Territory of New Mexico in this cause for the reason and upon
150 the ground that this court heretofore, to wit, on the 18th day of December, 1896, in a similar action between the same parties (reported in 47th Pacific Reporter, page 725), decided every question involved in this case, and held that under the act of Congress incorporating the Atlantic & Pacific Railroad Company, approved July 27, 1866, its right of way includes all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations, and said right of way, including the road-bed, ties, and rails, station buildings, workshops, depots, machine shops, &c., is not liable to taxation in the Territory of New Mexico, and this case is *stari decisis*.

C. N. STERRY,
KARL A. SNYDER,
Solicitors for Appellees.

Service of foregoing motion & notice acknowledged this 17th of August, 1897.

F. W. CLANCY.

Endorsement: No. 733. In the supreme court, Territory of New Mexico. Territory of New Mexico, appellant, — United States
151 Trust Co. *et al.*, appellees. Motion for affirmance of judgment. Filed in my office this Aug. 20th, 1897. Geo. L. Wyllys, clerk. C. N. Sterry & Karl A. Snyder, Albuquerque, N. M., solicitors for appellees.

And afterwards, to wit, on the 20th day of August, A. D. 1897, at the said regular term of the said supreme court of the Territory of New Mexico, the following, among other, proceedings were had, which *is* in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, Appellant,
vs.
UNITED STATES TRUST COMPANY OF NEW YORK *et al.*, Appellees. } 733. Appeal from Bernalillo County.

Now come the appellees herein, by their solicitor, Karl A. Snyder, Esq., and moves the court to affirm the judgment of the

court below in this cause, and after argument of counsel for the respective parties hereto was heard, and the court, not being fully advised in the premises, takes the same under advisement.

152 And afterward, to wit, on the twenty-fifth day of said regular term of said supreme court of said Territory, the same being Monday, the 23rd day of August, A. D. 1897, the following, among other, proceedings were had, to wit:

TERRITORY OF NEW MEXICO, Appellant, *vs.* THE UNITED STATES TRUST COMPANY OF New York and Charles A. Smith, Receiver of Atlantic and Pacific Railroad Company, Appellees.	733. Appeal from District Court for Bernalillo County.

This cause having been submitted to and taken under advisement by the court at a former day of the present term on the motion of appellant to affirm the judgment of the court below, the court, being now sufficiently advised in the premises, announces its decision by Chief Justice Smith, the associate justices concurring, denying said motion and affirming the judgment of the court below upon the authority announced in cause No. 670 on the docket of this court, entitled The United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, *vs.* Atlantic and Pacific Railroad Com-
153 pany *et al.*, in the matter of the intervening petition of the Territory of New Mexico. It is therefore considered and adjudged by the court that the judgment of the district court of the county of Bernalillo, whence this cause came into this court, be, and the same hereby is, affirmed upon the authority above stated, and, in accordance with said judgment of said district court, it is ordered, adjudged, and decreed that the said intervening petition be, and the same hereby is, dismissed, and thereupon the appellant herein prays the court for an appeal to the Supreme Court of the United States of America from the order and decree of this court. It is therefore ordered by the court that the appellant herein, The Territory of New Mexico, be, and it hereby is, allowed an appeal from the said order and decree of this court to the Supreme Court of the United States of America.

UNITED STATES OF AMERICA,
Territory of New Mexico, Supreme Court.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing 154 pages *is* a
154 true and perfect copy of the transcript of record and papers on file and record entries in a cause lately pending in said supreme court entitled Territory of New Mexico *vs.* The United States Trust Company of New York and Charles A. Smith, receiver of Atlantic and Pacific Railroad Company, as the same appears on file and of record in my office.

Seal Supreme Court, Territory of New Mexico.

Witness my hand and the seal of said supreme court of the Territory of New Mexico this 25th day of August, A. D. 1897.

GEO. L. WYLLYS, *Clerk.*

Endorsed on cover: Case No. 16,671. New Mexico Territory supreme court. Term No., 458. The Territory of New Mexico, appellant, *vs.* The United States Trust Company of New York *et al.* Filed September 20th, 1897.

No. 368, 458 & 459.

Motion papers.

FILED
JAN 24 18
JAMES H. McKEN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 24, 1898.

THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	*No.* 368.
THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	*No.* 458.
THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	*No.* 459.

Now comes the Territory of New Mexico, appellant, in the three above-entitled causes, and moves the Court to

consolidate the said three cases for argument in this Court and to set them down for argument as a single case, and permit the filing of one set of briefs for use in all three of said cases, for the reason, as will appear by inspection of the records, that the principal question involved in each of said cases is identical, and such differences as there may be are of a minor character which can be readily elucidated and presented in a single brief and argument on each side.

F. W. CLANCY,
Solicitor for Appellant.

I unite in foregoing motion.

E. D. KENNA,
Solicitor for Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE TERRITORY OF NEW MEXICO, Appellant, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 368.
THE TERRITORY OF NEW MEXICO, Appellant, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 458.
THE TERRITORY OF NEW MEXICO, Appellant, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 459.

MOTION TO ADVANCE.

Now comes the Territory of New Mexico, appellant in each of the three above-entitled causes, and moves the

Court to advance said cases for argument on the earliest practicable day at the present term of the Court, for the following reasons:

1. The said cases involve matters of general public interest in that they are prosecuted for the purpose of establishing the right of the said appellant to recover large amounts of money claimed to be due for taxes levied upon the property of the Atlantic and Pacific Railroad Company as to which an exemption is claimed by virtue of the provisions of the act of Congress approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast."

2. The amount of such taxes with the interest thereon as provided for by the statutes of New Mexico, computed upon the most favorable basis to the appellees, will amount to nearly, if not quite, the sum of $200,000 by the time a decision can be reached in this Court, even if the cases be advanced, and the financial condition of the said Territory of New Mexico is such as to make it highly important to have such decision at the earliest possible day.

3. The rate of interest upon delinquent taxes as fixed by the statutes of New Mexico is twenty-five per centum per annum, and if the appellees are required ultimately to pay the said taxes, it is only fair and just to them that the fact should be ascertained as soon as possible so as to stop the running of such a high rate of interest.

F. W. CLANCY,
Solicitor for Appellant.

I unite in foregoing motion.

E. D. KENNA,
Solicitor for Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 106.
The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 169.
The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 170.

STATEMENT OF CASE.

These three cases have been consolidated for argument for the reason that the principal question involved in each case is the same, and appellant submits but one brief to cover its appeals in all of the cases.

The first of these cases was begun by the filing in the district court for Bernalillo county, in the Territory of New Mexico, by the district attorney for the territory, of an intervening petition on behalf of the territory praying for an order against the receiver of the Atlantic and Pacific Railroad Company, requiring him to pay the amount of taxes claimed to be due upon the improvements on the right of way of said railroad company in the county of Bernalillo, and upon station

houses and other improvements at seven different stations in said county. The taxes claimed were for the years 1893, 1894 and 1895.

The receiver above referred to had been appointed at the instance of the United States Trust Company of New York in a suit brought to enforce the lien of a mortgage made to secure the first mortgage bonds of the railroad company.

It was contended on behalf of the receiver that the property sought to be taxed was exempt from taxation by virtue of section two of "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast", which became a law July 27, 1866. So much of said section as is material to this controversy, is as follows:

> And be it further enacted that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water-stations; and the right of way shall be exempt from taxation within the territories of the United States.
>
> *14 Statutes at Large, 292.*

The argument in favor of this claimed exemption was that the donation of the right of way was such as to vest in the railroad company a title in absolute fee simple to land one hundred feet in width on each side of said railroad where it might pass through the pub-

lic domain; that all of the improvements sought to be taxed were affixed to and had become a part of the realty; that the land being exempt from taxation by the act of Congress, all improvements which were affixed thereto were also exempt from taxation as apart thereof.

The Territory contended that the right of way donated was only an easement and that alone was exempt from taxation, in accordance with the general rule that all exemptions from taxation are to be strictly construed; that even if the railroad company owned the land, over which it had a right of way, in absolute title, yet the exemption was of the land only, and for purposes of taxation the improvements thereon were separable from the land and properly subject to tax; and that, if there were merely a doubt as to the exemption extending to the property sought to be taxed, the existence of that doubt was fatal to the claim of exemption.

The district court held with the territory, the opinion of the judge of that court being found at page 55 of the printed record. Upon appeal to the supreme court of the territory that court reversed the decree of the court below and dismissed the intervening petition of the territory. From that decision the territory has appealed to this court.

After the decision of the supreme court of the territory, the second of these cases was begun by a like intervening petition filed in the same district court for the purpose of obtaining the payment of taxes on similar property in the county of Valencia for the years 1892 to 1896, both inclusive. The district court upon a hearing as to sufficiency of pleas to that intervening petition, declined to pass upon that question and dismissed the intervening petition because it fell within the decision of the supreme court of New Mexico theretofore rendered in the first of these

cases. Upon appeal to the supreme court of the territory this decree was affirmed and an appeal was then taken to this court.

In this case it appears that in Valencia county the railroad line runs over what was public domain of the United States when the right of way was granted, for a distance of 33 miles, and over land which was held in private ownership at the time of said grant, for a distance of 60.7 miles.

Record in No. 169, pp. 80-1.

The third of these cases was begun in like manner for the purpose of setting up the claim of the territory for taxes in Bernalillo county for the year 1896 upon the same kind of property, and the same proceedings were had in this case as in the second one.

While the defenses made in the district court raised a number of minor points as to mode of assessment and other like matters, yet it is obvious that the main question for consideration, and, indeed, the only one passed upon by the supreme court of New Mexico, is as to the effect of the exemption contained in that part of section two of the act of Congress already hereinbefore quoted. To that question alone will attention be given in this brief.

The appellant has made, in the several cases, the following

ASSIGNMENTS OF ERRORS:

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 106.

Now comes the said appellant by its solicitor and says to the court here that there is manifest error in the record and decree in this cause, and specifies for error the following:

1. The supreme court of New Mexico erred in reversing the decree of the district court of Bernalillo county.

2. The supreme court of New Mexico erred in denying and dismissing the intervening petition of appellant.

3. The supreme court of New Mexico erred in finding that there had been any assessment for taxes of the right of way and necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations in the county of Bernalillo, territory of New Mexico.

4. The supreme court of New Mexico erred in finding that the taxes and penalties levied on the improvements placed on the right of way and other grounds of the Atlantic & Pacific Railroad Company were unlawfully and illegally levied.

Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 169.

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Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 170.

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POINTS AND AUTHORITIES.

I.

A right of way is a mere easement, and the grant of a right of way does not carry the fee to the land.

When words and phrases which have acquired well-known, technical meanings in the law, are used in a statute, the rule of construction is that no other or different meaning shall be given to them.

Cooley's Const. Lim., 60.

Sutherland on Statutory Construction Sec. 247, 346.

Reference to any standard law dictionary will show that a right of way is a mere easement, and that a conveyance of a right of way cannot be held as conveying the fee in the land.

> "Right of way" in its strict meaning, is "the right of passage over another man's ground;" and its legal and generally accepted meaning, in reference to a railway, is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase, (*Mills on Em. Dom., Sec. 110.*) It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way.

Williams vs. Western Union Railway Co., 50 Wis., 76.

Ottumwa R. R. Co., vs. McWilliams, 71 Iowa 164.

Kellogg vs. Malin, 50 Mo., 499-500.

Atlantic & Pacific R. R. Co., vs. Lesueur, 19 Pac. 157.

Lyon vs. McDonald, 78 Texas, 71.

Lumby vs. Vermont Cent. R. R. Co., 23 Vt. 387.

Chicago & Southwestern R. R. Co., vs. Swivney, 38 Iowa 182.

Probably the only authority to be found any where

which even appears to militate against this position, is the case of the *Railway Co. vs. Roberts, 152 U. S., 114.* In that case, at page 122, referring to the grant of a right of way similar to the one under consideration in the present case, the court said:

> No such right was relinquished until after the grant of the right of way, under the act of Congress of July 26, 1866, to the Missouri, Kansas & Texas Railway, and the title of the lands composing the right of way had become vested in that company.

It was urged below on behalf of appellees that this is an adjudication that the absolute fee in the land passed to the railway company by the act of congress. An examination of this case will show that this point was not involved, that the court refers to the vesting of the title in a cursory way, and that the construction sought to be placed upon the language of the court by appellees is a strained one. The comment of Judge Ross upon this language is so pertinent that we quote it as follows:

> No point appears to have been made in the case as to whether the right of way there granted to the railway company was but an easement, or carried the fee, nor was such point necessarily involved, since the grant of the right of way for the construction of the railroad, whatever its nature, necessarily carried the right of possession thereto, as against any inconsistent use thereof. I do not think, therefore, that the case of *Railway Co vs. Roberts* should be held to be an adjudication by the supreme court that a grant of the right of way over the public domain is not the grant of an easement therein, but necessarily carried the fee thereof, or that the court so intended it, especially where, as in the case at bar, the act of Congress grants to the railroad company various sections of the public lands, for which it is provided patents shall be issued by the officers of the government, and also grants the right of way over lands of the government, for which no provision is made for the issuance of any evidence of title. Of course this distinction in the grant between

the lands granted in aid of the construction of the road, and the right of way therefor, is not conclusive, for the fee of land may be granted by direct act of Congress. But, in my opinion, it strongly indicates that Congress did not intend that the grant of the right of way of the Atlantic & Pacific Railroad Company should cover the fee of the lands included only within the right of way, but only such an easement therein as, under the settled rules of law, is usually covered by such grants. *Williams vs. Railway Co. (Wis.) 5 N. W. 482; Lumber Co. vs. Harris (Tex. Sup.) 13 S. W. 453; St. Onge vs. Day (Colo. Sup.) 18 Pac. 278; Railroad Co. vs. Lesueur (Ariz.) 19 Pac., 157; Mills Em. Dom., Sec. 110.*

Mercantile Trust Co. vs. A. & P. R. R. Co., 63 Fed. 913.

It is perfectly clear that Congress when it passed the act of 1866, creating the Atlantic & Pacific Railroad Company, proceeded upon the assumption that the territories which it had created, including New Mexico, would have the power to tax the company upon its property, and even upon a mere easement or right of passage through the territory, because it found it necessary to insert in that act a special provision that "the right of way shall be exempt from taxation within the territories of the United States."

II.

The exemption of the right of way from taxation does not exempt the improvements thereon.

In other words, reversing the proposition, improvements affixed to the land by the owner of the right of way, do not become a part of the mere easement, but are property—real estate—of that owner, distinct and separable from the mere right of way for purposes of taxation.

The argument of appellees is, that the property, the taxation of which is in question in the present case, is so affixed to the land over which the railroad company

has its right of way, as to become a part of the realty, and whether the grant of the right of way is to be taken as an absolute grant of the land itself, or as conveying only an easement, this property cannot be assessed for purposes of taxation separately from the land itself, but has so become a part of it that it can be taxed only if the land itself be taxable. It is not claimed on the part of the territory that the land can be taxed, or that the easement of the railroad company can be taxed; nor is it claimed that the property in question can be taxed as personal property. It is claimed, however, that, although it must be classed as real estate under our statute, being covered by the statutory definition of "improvements," yet there is nothing in its nature which prevents it from being assessed like any other property. In the first place, our statute clearly contemplates the possibility of improvements being assessed and taxed separately from the land to which they are affixed, as will be seen by reference to section 4019 of the compiled laws of 1897, where we find the following language;

> The terms mentioned in this section are employed throughout this chapter in the sense herein defined:
>
> First. The term "real estate" includes all lands within the territory, to which title or right to title has been acquired; all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto, and improvements.
>
> Second. The term "improvements" includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

In the absence of such a statute as this there might be more force to the contention that such improvements could not be assessed separately from the ownership of the land, but our statute clearly provides for such a contingency. Our position on this

matter need not rest, however, entirely upon construction of the statute, but is amply supported by adjudicated cases.

> The property assessed in this case is the track of the relators consisting of its stringers, ties and rails. This track is laid down in the public highway, and the relators have or claim no interest in the land of the highway, save a right to use the same for the passage of their teams and vehicles to and fro over this track. This right they claim, and doubtless have, and it includes a right to the constant and exclusive, and for the extent of their chartered existence, the lasting use of the soil, for the support of their track. It is an easement. (*Williams vs. New York Central Railroad Co., 16 N. Y. 97-109; Craig vs. R. & B. R. R. Co., 39 N. Y., 404.*) And this is an interest in the land over which it is enjoyed. (*Washburn on Easements, 6.*) It gives them the right of the exclusive possession as from time to time they shall need to use any part of it.
>
> By the statutes in relation to easements and taxation (*1 R. S., 360, Sections 1, 2,*) "all lands * * * within this state, whether owned by individuals or corporations, shall be liable to taxation * * *" "The term 'land' * * * shall be construed to include the land itself, and all buildings, and all other articles erected on or affixed to the same * * * and the terms 'real estate' and 'real property' * * * shall be construed as having the same meaning as the term 'land' thus defined."
>
> By force of these provisions, the track of the relators, consisting of stringers, ties and rails, affixed to the land, is, for the purpose of assessment and taxation, land, real estate, real property. And is liable to taxation. To some name, or in some way it should be assessed. This does not seem to be seriously disputed by the relators. But they suggest that if the assessors did their duty, which is always to be presumed, then they assessed to the owners of the fee in the land, over which the highway run, the land to the center of the highway, and must be presumed to have assessed to them, the land at a valuation affected and increased by the value of the fixtures, which make the track of the relators. We do not think

that such a presumption can be entertained. The facts in the case are too potent and well known to permit the presumption, that the track was considered as belonging to the owner of the fee, which is little more than a reversion, contingent if at any time in the future the different rights of way over the land shall cease.

We are not inclined to give to the terms of the statute a construction so narrow as that required by the position of the relators. That would be to hold that buildings and fixtures are not included in the term "land," except as inseparable, in the consideration of the ownership thereof, from the ownership of the fee; and that no right or interest in the land less than the fee thereof would, for the purpose of assessment, be deemed to fall within the meaning of "land," as set forth in the statute. The statute means, for its purpose, to make two general divisions of property; one all lands, another all personal estates; and then to be more definite, it declares, that by land is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not in the view of the statute, land, unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion that the statute means that such an interest in real estate, as will protect the erection, or affixing thereon, and the possession of buildings and fixtures, will bring those buildings and fixtures within the term "lands," and hold them to assessment as the lands of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures.

The defendants were right then, in considering the right of the relators as land, and liable to assessment as such. (See *The People vs. Beardsley, 52 Barb., 105*, since (September, 1869,) affirmed in this court.)

People vs. Casity, 46 N. Y., 48-50.

People vs. Commissioners, 82 N. Y. 462-3.

This is a tax suit, the defendant claiming that no taxes on the property can be recovered of him. The city and county of San Francisco, in 1875,

under the act of March 30th, 1875, leased to defendant a portion of the school lot belonging to the city and county, located at the corner of Market and Fifth streets. The defendant took possession of the leased land and made improvements and erected a substantial four story frame building, with brick foundation, attached to the soil. For the fiscal year 1881-2 the building and improvements were assessed to defendant, and this suit is to recover the taxes. The defendant insists that he is not liable for the taxes, because, he says, first, the city and county own the realty, the improvements and building are portions of the realty, and therefore not his property; and second, section 3887 of the Political Code, as in force at the date of the lease, declared that the "lessor of real estate is liable for the taxes thereon," and the city and county, being liable, cannot recover of him.

It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, for the purpose of revenue, the legislature of this state has observed a distinction between real estate and improvements, and that distinction has been recognized by this court.

Section 3607 of the Political Code, as in force in 1875, declared that property of municipal corporations was not subject to taxation. If, as contended, the building and improvements were portion of the realty and thus exempt, the provisions of the constitution of 1863, as to uniformity of taxation, might be evaded.

We are of the opinion that, for the purpose of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes.

San Francisco vs. McGinn, 67 Cal. 110.

People vs. Shearer, 30 Cal. 656.

Crocker vs. Donovan, 30 Pac. 377.

Turney vs. Saunders, 4 Scam. 527.

Waller vs. Hughes, 11 Pac. 122.

Gold Hill vs. Caledonia Co., 5 Sawyer, 575.

A. & P. R. Co. vs. Lesueur, 19 Pac., 159.

For the purpose of taxation each (land and buildings erected thereon) is separate and dis-

tinct from the other. The exemption of the land from taxation does not imply the exemption of the buildings erected thereon, any more than the exemption of the building implies the exemption of the land. As respects taxation the two descriptions of property are as separate and distinguishable as real estate is from personal property. The statute means what it says and no more; if the legislature intended to give it a broader meaning than is expressed it would have said so. The court will not enlarge the meaning of the statute by implication in order to give it an effect contrary to common right.

Portland, etc., R. R. Co. vs. Saco, 60 Me. 196.

III.

Exemption from Taxation is the Exception, and all such Exemptions are to be Strictly Construed.

It ought not to be necessary to cite authorities in support of this proposition, but because of the attempt to extend by implication the exemption given by congress to something far beyond its terms, on account of the alleged congressional purposes in creating the railroad company, and by the suggestion that, in order to be of great value the exemption must certainly include more than is indicated by the language used, attention will be called to a few cases as illustrative of the strictness with which this rule is held and enforced by the courts.

In the leading case of *Providence Bank vs. Billings, 4 Pet. 514, Chief Justice* Marshall, speaking of a partial release of the power of taxation by a state in a charter to a corporation, said: "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." "We must look for the exemption in the language

of the instrument; and if we do not find it there, it would be going very far to insert it by construction." *(4 Pet. 561-563.)*

In Philadelphia & Wilmington Railroad vs. Maryland, 10 How. 376, Chief Justice Taney said: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms." *(10 How. 393.)*

In the subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken"; that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt"; that "nothing can be taken against the state by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arises as to the intent of the legislature, that doubt must be solved in favor of the state;" that a state "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris.*" *Jefferson Branch Bank vs. Skelly, 1 Black 436, 446; Gilman vs. Sheboygan, 2 Black, 510, 513; Delaware Railroad Tax, 18 Wall., 206, 225, 226; Hoge vs. Railroad Co., 99 U. S. 348, 355; Southwestern Railroad vs. Wright, 116 U. S. 231, 236; Erie Railway vs. Pennsyvania, 21 Wall., 492, 499; Memphis Gaslight Co. vs. Shelby Taxing District, 109 U. S. 398, 401; Tucker vs. Ferguson, 22 Wall., 527, 575; West Wisconsin Railway vs. Supervisors, 93 U. S. 597; Memphis & Little Rock Railroad vs. Railroad Commissioners, 122 U. S. 609, 617, 618.*

Railroad Co. vs. Dennis, 116 U. S. 667-8-9.
Banks vs. Tennessee, 104 U. S. 496-7.
Railroad Co. vs. Thomas, 132 U. S. 185.
Schurz vs. Cook, 148 U. S. 409.
Railroad Co. vs. Alsbrook, 146 U. S. 294.
Railroad Co. vs. Guffey, 120 U. S. 574-5.
Land Co. vs. Minnesota, 159 U. S. 529.
A. & P. R. Co. vs. Lesueur, 19 Pac. 159.

IV.

The Territorial Legislature possesses all the power of Congress in Legislating for the Territories. subject only to the express limitations imposed by Congress itself.

At the first glance it may be difficult to see what this proposition has to do with these cases, or why it is necessary to present argument in its support, established as it is by former decisions for this court. By reference, however, to the opinion of the supreme court of New Mexico, which appears in the record of case No. 106, beginning at page 69—and we are here to show the unsoundness of that opinion—it will be seen that the conclusions reached are based upon two positions, the first being that territorial governments are of such inferior character that their legislation is entitled to but little weight; and the other that a liberal rule of construction must be applied to the exemption of the right of way from taxation, instead of the usual construction applied by courts to such exemptions. The second position to some extent depends upon the establishment of the first.

That court in that opinion holds, in substance, that the territorial governments have but limited and special powers, specifically enumerated by congress, while appellant's position is that those governments have, as has been declared by this court, very broad

and ample powers, but little, if any, inferior to those possessed by the states.

In order to avoid any misunderstanding of this contention, quotation is made from the opinion of the court below of that which appears most strongly and clearly to state the proposition upon which the case is made to turn, as follows:

> It is true that exemption from taxation by a state is construed with strictness in favor of a state, but it will be observed that this discrimination exists where the exemption is the action of a state as to property within its jurisdiction, not a privilege derived from the general government for the benefit and welfare of the public in a territory belonging to the United States. The Atlantic and Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent of benefits conferred upon one by the other. It is not, we conceive, legitimate in arriving at the rights of the territory in the premises, to consider it as though it had created a factor and was exacting a tribute for its favor. The United States presents no problem, asserts no claim, having by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Without a controversy between the government and the company, the grant should, in the language of the supreme court, *150 U. S., page 14*, receive a liberal construction in favor of the purpose for which it was enacted, and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the territory to settle their respective rights. The company derives its rights from Congress, and they should be ascertained and determined by rules that will evolve the intention of Congress and not to oppress in the interest of a local government.

It will be seen that the court holds in effect that if this controversy were between the United States and the railroad company—if this were a question arising as to legislation by Congress imposing a tax—a differ

ent rule of construction would be applied to the exemption question from that which is proper in considering legislation of the territory.

I desire to reiterate that acts of the territorial legislatures are to be considered by the courts, so long as they are not inconsistent with the laws and constitution of the United States, as of the same importance and dignity as laws enacted by Congress itself for the government of the territories, and that they are not hedged about, hampered or obstructed as are the acts of Congress itself when that body is legislating for the country at large in the exercise of its limited and delegated powers.

The constitution of the United States confers upon Congress certain enumerated and specific powers, and it is conceded by the advocates of even the most liberal rule of constitutional construction, that the federal Congress can exercise no other powers than those which are expressly set forth in the constitution, or are necessarily implied; but this part of the constitution and this doctrine applies to the powers of Congress delegated by the states and to be exercised in and for the states. When we come to the consideration of the power of Congress to legislate for the territories, as set forth in the constitution, or as established by a long course of congressional and judicial construction, we find that that power is absolute, complete and unlimited (except by the constitutional provisions as to rights of persons and property) as would be the power of a state legislature if unhampered by a state constitution. This power, in almost its entirety, has been delegated by Congress to the territorial legislatures. Nothing can be found in adjudicated cases inconsistent with this view, and every expression of this court is in harmony with it, and it is clearly recognized in at least one territorial case, from which quotation will be hereafter made.

At the outset of the consideration of authorities on this subject it is essential to call attention to the language of this court in what is undoubtedly the leading case as to the character of territorial goverments:

> Whenever Congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject also, however, to the right of Congress to revise, alter and revoke at its discretion. The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively coextensive with and corresponding to that of the state courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state courts, are invested with plenary municipal jurisdiction.
>
> *Hornbuckle vs. Toombs, 18 Wall., 657.*

In another case this court has declared that the theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress. In the same case the court further says that "in all the territories full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all."

Clinton vs. Englebrecht, 13 Wallace, 441, 443-4.

> While this statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. By section six of the act of September 9th, 1850, (9 Stat. at L. 453,) establishing a territorial government for Utah, it is provided: "That the legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands of other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." With the exceptions noted in this section, the power of the territorial legislature was apparently plenary as that of a legislature of a state. *Maynard vs. Hill, 125 U. S. 204.* The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress.

Cope vs. Cope, 137 U. S., 684.

The case last cited is also interesting and instructive because it proceeds elaborately to consider the effect of congressional enactments under which an annulment of territorial statutes by implication was claimed, in precisely the same way as would be considered the question of a repeal by implication of an act of the Congress itself, thus clearly putting territorial legislation on the same level as legislation by Congress.

In the territory of Utah a case arose involving the validity of an act of the legislature of the territory of Idaho by which the bonds of matrimony between Ly-

man P. Higbee and his wife were declared dissolved, and the supreme court of Utah, in a very elaborate opinion, held that such an act was beyond the power of a territorial legislature.

In re Higbee, 5 Pac. 694 et seq.

Attention is called to this Utah case for the sake of emphasizing an opinion of this court, which is directly opposite to that of the territorial court. In the opinion of this court, at some length, but with great clearness, the almost unlimited power of territorial legislatures is upheld, and language is used indicating at least an unwillingness positively to declare that the prohibition of the federal constitution against the impairment of contracts applies to legislation by territorial legislatures,—an unwillingness only consistent with the position which we take that the territorial legislatures are really Congress in another form.

Maynard vs. Hill, 125 U. S. 203, 210.

In more recent cases in this court, like views of the extent of the legislative power of territorial governments are expressed.

Thomas vs. Gay, 169 U. S. 271-2-3.

McHenry vs. Alford, 168 U. S. 664, 669.

> The only question presented in the court below or in this court, is the effect as to the plaintiff in error of said section 118, Rev. St. Wyo. It is urged that this section is in its nature and effect a bankrupt or insolvent law, and that the legislature of the Territory of Wyoming had no power to pass a bankrupt or insolvent law. Without discussing the question as to how far this section 118 partakes of the nature of a bankrupt or insolvent law, and waiving the question as to what the effect would be upon the other portions of the assignment law if this section should be found invalid, we will consider the power or authority of the legislature to pass such a law. The argument of the plaintiff in error, stated briefly, is that the authority of the legislature of Wyoming territory was derived from Congress, that Congress could

confer no greater power than it had itself; and that Congress had no power or authority to pass a bankrupt or insolvent law for Wyoming territory. This argument rests upon the assumption, which is made as the basis of the argument, that the power of Congress upon this subject is derived from and limited by sub-division four of section eight of article one of the constitution of the United States, conferring upon Congress power to establish "uniform laws on the subject of bankruptcies throughout the United States." As to this contention it is sufficient to say that the power of Congress to legislate for the territories is not derived from nor limited by this nor any other express provision or provisions of the constitution. As to the extent of this power the supreme court of the United States says: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. Congress may not only abrogate laws of the territorial legislature, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territory and all departments of the territorial government. It may do for the territories what the people, under the constitution of the United States, may do for the state." *National Bank vs. County of Yankton, 101 U. S. 129.* It is thus apparent that the doctrine that the general government is one of limited powers granted by the states, and enumerated in the express provisions of the constitution, or derived by necessary implication from such enumerated powers, however just and salutary, as applied to the states, has no application to the territories of the United States. The power of Congress to legislate for the territories, is not to be compared to nor measured by its powers to legislate for the people of the states. It is not a power which was granted to the general government in the adoption of the constitution by the states. It is not one which was withheld by them. It is one which they never possessed, either to grant or withhold. It is one of the essential and most important attributes of sovereignty; a sovereignty

which no state ever possessed or claimed or attempted to exercise outside of its own boundaries. The source of this plenary power of legislation for the territories our courts have seldom, if ever, attempted to define. As to its existence, there is at this day no question. "Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the powers and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from whence the power is derived, the possession of it is unquestioned. In legislating for them (the territories) Congress exercises the combined power of the general and of a state government." *Insurance Co. vs. Canter, 1 Pet. 541.* This language was commented upon and explained in the case of *Dred Scott vs. Sanford*, but not so as to interfere with its application to cases such as the one at bar. "The distinction between federal and state jurisdiction under the constitution of the United States has no foundation in these territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of the courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both federal and state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction." *Benner vs. Porter, 9 How. 242.*

Downes vs. Parshall, 26 Pac. 995.

Ty vs. Guyot, 22 Pac. 134.

A. & P. R. R. Co. vs. Lesueur, 19 Pac. 160.

V.

Nothing but a strict rule of construction can be properly applicable to the exemption of the right of way from taxation.

As has been already shown, the court below in great part, at least, put its denial of this proposition upon the ground that this controversy is not one between the railroad company and the power which granted the exemption, and we have endeavored to show that, so far as it rests upon this basis, that court is in error. The reasoning adopted by the court, based upon what was, or ought to have been, the intent of Congress, in view of the conditions existing at the time of the passage of the act in 1866, and of the difficulties in the way of constructing the proposed railroad, is of precisely the same character as that which was urged upon this court in at least two similar cases, but without avail.

> It is argued in support of this writ of error that, as the exemption from taxation of the capital stock was unqualified and perpetual and began at the moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to ten years after the completion of the railroad; and that the legislature, while exempting the railroad from taxation for ten years after its completion, *could not have intended to subject it to taxation before its completion and while its earnings were little or nothing.*
>
> On the other hand, it is argued that the consideration of the exemption from taxation, as of all franchises and privileges granted by the state to the corporation, was the undertaking of the corporation to prosecute to completion, within a reasonable time, the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said railroad"

without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the state had never allowed a similar exemption to take place, except after a railroad had been entirely finished; and this argument is supported by the opinions of the supreme court of Louisiana in *State vs. Morgan, 28 La. Ann., 482, 491,* and in the case at bar, *34 La. Ann., 954, 958.*

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite and unambiguous.

In their natural and legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years after its completion. If the legislature had intended to limit the end only and not the beginning of the exemption, its purposes could have been easily expressed by saying "until" instead of "for," so as to read "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter.

To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to *insert by construction* what is not found in the language of the contract; to presume an intention which the legislature has not manifested in clear and unmistakable terms; to surrender the taxing power, and to go against the uniform current of decisions of this court upon the subject, as shown by the case above referred to.

Railroad Co. vs. Dennis, 116 U. S., 669-70.

By the eighth section of the company's charter it was declared "that said company, its stock, its railroads and appurtenances, and all its property in this state necessary or incident to the full exercise of all the powers herein granted, not to include compresses or oil mills, shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this state." If the provision had terminated with the words "Mississippi river," it would not be open to argument in this court that the exemption claimed did not commence until the river was reached.

In *Vicksburg, S. & P. R. Co. vs. Dennis, 116 U. S., 665*, it was held that a provision in a railroad charter by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, work-shops, warehouses, vehicles of transportation and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this state," did not exempt the road, fixtures and appurtenances from taxation before such completion. It was argued, as it is here, that the legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion, and when its earnings were little or nothing; on the other hand, it was argued there, as it is here, that one reason for defining the exemption of the road and its appurtenances from taxation, as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation by postponing or omitting the completion of a portion of the road; but this court said, speaking through Mr. Justice Gray: "Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision where the

words of the statute creating the exemption are plain, definite and unambiguous." It appeared there, as it does here, that the taxing officers of the state had omitted in previous years to assess the property, but it was held that such omission could not "control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." And the court took occasion to reiterate the well settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*.

Tested by that rule, did the addition of the words "but not to extend beyond twenty-five years from the date of the approval of this act," operate to create an exemption of twenty-five years from the date of the act, subject to being reduced to less than that if the road were completed to the river before the lapse of five years, but for twenty years at all events; or did it operate to reduce the term of the twenty years exemption by so much as the completion of the road to the river took over five years. Upon the one view there would be a loss of the exemption through the rapidity of construction; in the other view, a gain, or rather, the prevention of a loss. Does it appear by clear and unambiguous language that the state intended to surrender the right of taxation for twenty-five years? If the surrender admits of a reasonable construction consistent with the reservation of the power for a portion of the longer period, then for that portion it cannot be held to have been surrendered. Is not the construction that the exemption was to be for a term of twenty years, subject to a diminution of that term if the river were not reached in five years, as reasonable as the opposite construction; and if the latter construction be adopted, would it not be extending the exemption beyond what the language of the concession clearly requires? Can an exemption expressly limited to a term of twenty years after the accomplishment of a designated work, but not to extend beyond twenty-five years from a certain date, be read as an exemption for twenty-five years, but not to

extend beyond twenty years from the completion of that work? It seems to us, notwithstanding the ample and ingenious arguments of appellant's counsel, that these questions answer themselves, and that the exemption claimed cannot be sustained.

* * * * * *

Again, the preamble of the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one of "great public importance" and "to be encouraged by legislative sanction and liberality" and that "the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country." But, as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up. Indeed, what is therein stated appears to us to be quite as referable to the remarkably extensive powers granted as to the assignment of reasons for exemption from taxation.

It is true that it is stated in section eight that, in order to encourage the investment of capital in the enterprise, and "to make certain in advance of such investment, and as inducement and consideration therefor, the taxes and burdens which the state will and will not impose thereon," the exemption is thereby declared. Yet if, notwithstanding that statement, the matter were left uncertain, that would not allow the court to make it certain by construction, and to *remove ambiguity upon the presumption of a legislative intent* contrary to the fixed presumption where the rights of the public are involved. In short, there can be no uncertainty in the result where the language used is construed, as it must be, in accordance with thoroughly settled principles.

R. R. Co. vs. Thomas, 132 U. S. 184-5-6, 188-9.

In the present case, in order to sustain the greatly expanded exemption claimed by the railroad company, it has been necessary for the court below to take judicial notice of a great variety of conditions and facts which it is urged tend to show what must have been the intention of Congress in creating and aiding the railroad company, and certainly such a necessity must be "in itself fatal to the claim set up," quite as much as the necessity of resorting to a preamble of an act "to assist in ascertaining the true intent and meaning of the legislature." In that preamble, things were distinctly and clearly set out so as to indicate what was within the contemplation of the legislature, and it was, therefore, much more certain and definite than any general view of the condition of the country and the circumstances surrounding the proposed construction of a railroad.

We call particular attention to the language of this court in a recent case, where it speaks as follows:

> The applicable rule is too well settled to require exposition or the citation of authority. The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the state to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power.
>
> *R. R. Co. vs. Alsbrook, 146 U. S. 294.*
>
> *Keokuk R. Co., vs. Missouri, 152 U. S. 306.*

It is quite obvious from a mere casual examination of the opinion of the court below, that the language used by Congress in the act of 1866 as to the exemption, certainly "admits of reasonable contention," and this being so, "the conclusion is inevitable" against the position of the railroad company. We have cer-

tainly had a large amount of "reasonable contention" as to what the statute means.

In conclusion, it may be said that this court has never neglected any opportunity to reiterate its well-established doctrine upon this subject. In a recent case, decided in December, 1896, where the court was considering the question of the passage to a new corporation, which succeeded an old one, of the exemptions and immunities of the earlier corporation, the following language is used:

> These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or an immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. There are positive rights and privileges, this court said in *Morgan vs. Louisiana, 93 U. S., 217,* without which the road of a corporation could not be successfully worked, but immunity from taxation is not one of them. In a recent case *(Norfolk & Western R. R. vs. Pendleton, 156 U. S., 667, 673,)* we had occasion to say, in harmony with repeated decisions, that, "in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of a state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or purchase under foreclosure, to the property and ordinary franchises of the first grantee;" and that this was a salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and expressed requirements of

the grant construed *strictissimi juris. Morgan vs. Louisiana, 93 U. S., 217. Wilson vs. Gains, 103 U. S., 417. Chesapeake & Ohio R. R. vs. Miller, 114 U. S., 176.*

Turnpike Road Co. vs. Sandford, 164 U. S. 586-7.

It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause.

Ford vs. Land Co., 164 U. S., 666.

In the case just cited, this court, in harmony with the general principles to which it has constantly adhered, held that the effect of a statutory exemption from taxation should be restricted to something less than the absolute letter of the statute appeared to demand. A statute which exempted from taxation "all of the property and effects" of a corporation was held not to extend to some of the "property and effects" of that corporation because they were acquired under the authority of another statute passed at a later date than the one which contained the clause of exemption.

Ford vs. Land Co., 164 U. S., 666, 668-9..

These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being made the sole means by which sovereignties can

maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must, on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

Bank vs. Tennessee, 161 U. S. 146.

The court below refers to the case in *150 U. S.*, at page 14, in support of its position that the grant should "receive a liberal construction in favor of the purpose for which it was enacted." This is strange, to say the least, because, in that case, on the same page 14, the court says that it is "the well settled rule of this court that public grants are construed strictly against the grantees;" and on page 13, it is stated that "exemption from taxation is construed with greater strictness in favor of the state than grants of public property or rights."

U. S. vs. D. & R. G. R. Co., 150 U. S. 13, 14.

VI.

"The existence of a well founded doubt is equivalent to a denial of the claim" to an exemption from taxation.

The words above included in quotation marks are taken from a recent opinion of this court.

Insurance Co. vs. Tennessee, 161 U. S., 177-8.

As hereinbefore sought to be shown, a mere inspection of the opinion of the court below clearly indicates the existence of at least "a well founded doubt." In that opinion great stress is laid upon a variety of extraneous facts, outside of the legislation of congress and outside of the record, of which the court takes judicial notice, all for the purpose of ascertaining the supposed intent of Congress in granting the exemption in question. Such elaborate discussion and consideration of matters of this kind could hardly have been necessary in order to sustain the conclusion reached by the court if it could be said that there was no "well founded doubt" in existence.

Attention is called to the case last above cited for the reason also that counsel there urged upon the court a variety of "surrounding circumstances" which it was claimed should influence the conclusion of the court as to the meaning of the statutes under consideration, but the court could not find in such matters any sufficient reason "to depart from the universal and well established rule making a claim for exemption a matter to be proved beyond all doubt."

VII.

There is more than enough to be found in the statute to give full effect to the intention of Congress to aid the railroad, without considering the exemption of the right of way at all.

None of the other land grant railroads received larger donations of land per mile than the Atlantic & Pacific, and it is believed that but one other had its right of way exempted from taxation. Legislation by Congress to provide aid to railroads began in 1862, and continued until long after the charter of the Atlantic & Pacific. The Union-Central Pacific line obtained the passage of its first act in 1862, and another in 1864, greatly increasing the benefits conferred by the first act. The disposition of Congress and of the country was such that the projectors of that line, the first to be constructed, could have obtained almost anything they chose to ask for, but it does not seem to have occurred to anyone to attempt to secure a perpetual exemption from taxation of nearly all the property of the road, by exempting its right of way.

The Atlantic & Pacific route was notoriously the least expensive to construct and operate of any of the proposed roads from the Missouri river to the Pacific coast, and yet it is seriously claimed that in order to give effect to the necessary intent of Congress to aid in its construction, we must hold that a perpetual exemption of almost everything was given in order to induce the investment of capital. The extent of this exemption will appear by comparing what the company has actually paid in any year with what it would pay had it not claimed this exemption. For the year 1893, in Valencia county, it paid as taxes on its property, outside of lands, the sum of $75.28. Upon its lands it paid $2,004.99.

Record in No. 169, pp. 56-7.

The tax claimed by the appellant on the disputed items for the same year, in the same county, amounts to $23,064.63.

Same Record, p. 30.

The record shows that there were over ninety miles of road in Valencia county, and eight stations, worth over $400,000.

Same Record, p. 82.

Let us consider what this railroad company was given by Congress aside from this exemption:

It was given a right of way through the public lands; the right to take from the public domain adjacent to the road material of earth, stone, timber and so forth, for the construction thereof; lands to the extent of 12,800 acres per mile where the road should pass through any state, and 25,600 acres per mile through the territories, and the right of eminent domain. It was also expressly declared to be a post route and military road, which, while imposing certain duties towards the government, gives it privileges and immunities which it might not otherwise enjoy. The estimated length of the line when projected was about 2,500 miles, and the lands granted would amount to over 50,000,000 acres.

No reason can be found for expanding this exemption from taxation beyond the necessary meaning of the words employed in the statute, nor for applying to it any rule of construction different from that which has been so often announced in the opinions of this court.

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Solicitor for Appellant.

FELIX H. LESTER,
THOS. N. WILKERSON,
Of Counsel.

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October Term, 1898.

In the Supreme Court of the United States.

October Term, 1898.

No. 103, 104 and 105.

THE TERRITORY OF NEW MEXICO, Appellant,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

REPLY BRIEF OF APPELLANT.

F. W. CLANCY,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

Nos. 106, 169 and 170.

THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

REPLY BRIEF OF APPELLANT.

Appellees in their brief make nine "Points" which are as follows:

> "*First Point.* From the terms of the act approved July 27th, 1866, read in the light of the history of the times when it was passed, it is clear that Congress intended to prohibit each one of the Territories through which it might pass, from interfering by way of taxation with the railroad it was seeking to have built."
>
> "*Second Point.* It must be presumed that Congress knew the rule of the common law that fixtures attached to the freehold become a part thereof, and intended that this rule should apply to fixtures to be placed by the railroad company upon its right of way, so that such fixtures would become as completely a part of the right of way as the soil, the rocks and the trees composing the same at the time of the grant thereof."
>
> "*Third Point.* Congress intended that the right of way of the Atlantic and Pacific Company which

was provided for in the act under consideration, should be an estate in fee simple."

"*Fourth Point.* The grant of exemption from taxation of the 'right of way' contained in the second section of the act, exempted all improvements that Congress intended should be placed upon such right of way for the purpose of building and operating the railroad contemplated by the act."

"*Fifth Point.* If the question of the scope of this exemption be at all doubtful, the practical construction placed upon it by the Territory and its officers charged with the execution of the revenue laws, ought to receive great weight, if it be not controlling so as far as this Territory is concerned."

"*Sixth Point.* There is no provision in the laws of the Territory of New Mexico authorizing the segregation of the superstructure from the right of way of any railroad for purposes of assessment or taxation, and, therefore, the assessments in question were void."

"*Seventh Point.* The burden is upon the Territory to make it clearly appear that it has the right to assess for the purpose of taxation a part of an estate which Congress has declared exempt in such Territory from taxation either by Congress or the Territory."

Eighth Point. This is not formulated like the others so that it can be quoted. Its purpose appears to be to set out the absurdity of an opinion of the Supreme Court of Arizona; an erroneous statement that that Arizona case and one in Maine are the entire authority of appellant for its proposition that the superstructure is not a part of the "right of way" for purposes of taxation; and to reiterate the assertion that a Territory has no power to tax any portion of this railroad, and therefore appellant's brief is not applicable to the case.

"*Final Point.* The levies of taxes sought to be recovered by the intervening petitions in the three cases now before this court are illegal and void, re-

> gardless of any question of exemption or of any statutory authority of the Territory of New Mexico."

There are some things under each of these points which require some reply; but before proceeding to consider them in detail, attention must be called to the fact that counsel for appellees devote a great amount of space to showing that the property sought to be taxed is "real estate," as though the proposition were disputed by appellant; and, indeed, on pages 29, 32 and 55 of their brief they quite distinctly intimate that appellant's claim is that the property is personal, and has been assessed as such. At no stage of these proceedings, from their initiation in the District Court in New Mexico to the the present time, has the Territory claimed this property to be personal property, but has always asserted it to be "real estate," and taxable as such, under the statute from which quotation is made on page 10 of the original brief herein; and that, under that statute, it was, for purposes of taxation, separable from the soil to which it is attached. It was not necessary for appellees to struggle so hard to prove the "real estate" character of this property when appellant asserted the same thing.

Attention is also called to the fact that running through nearly all of the argument in the brief for appellees, and underlying and permeating the reasoning therein, is the idea of the inferior character of a territorial government and of the little weight to be given to territorial legislation, although there is no direct attempt to answer the argument in the original brief for appellant, at pages 16 to 23, which shows conclusively that territorial legislatures possess all the power of Congress itself when legislating for the territories, subject only to the express limitations imposed by Congress itself. It must be assumed that counsel for appellees could find no answer to this proposition.

We will now proceed to consider in detail so much of the brief for appellees as calls for special reply.

Appellees' First Point.

There is but little under this heading which requires notice. Counsel give some interesting historical information about the country at the time the railroad company was created, all with a view to inducing the court to hold that an exemption of the "right of way" means an exemption of the whole railroad and telegraph line, because Congress surely intended to be very liberal and generous. They declare that the Union-Central Pacific lines received—

> "actually larger land grants than were given by Congress to any of the other railroads afterwards created by it."

It is submitted that this is a mistake, but in discussing it, it is not admitted that it is proper or material for consideration in ascertaining the meaning of "right of way."

By reference to "The Public Domain" at pages 270 and 271, it will be found that the lands patented to the Union Pacific, with those estimated as necessary to complete the grant, amount to 11,097,082.49 acres, and the lands of the Central Pacific reach 7,638,589.75 acres, or a total for the two of 18,730,672.24 acres; while the lands of the Atlantic and Pacific are 23,176,536.50 acres, or nearly five million acres more than the Union-Central Pacific line.

Moreover, this road was notoriously less expensive to construct than the others, and was so known to be in 1866.

It is urged that Congress would not have given anything so worthless as the exemption of the mere right of way from taxation and therefore intended more. As this court said in the cases of *Railroad Co.* vs. *Dennis, 116 U. S. 665*, and *Railroad Co.* vs. *Thomas, 132 U. S. 184*, this argument—

> "rests too much on inference and conjecture to afford a safe ground of decision where the words of the statute creating the exemption are plain, definite and unambiguous."

But it is not true that the strip of land covered by the right of way is so utterly worthless, or was reasonably so to be considered when the exemption was granted. Whereever a town would grow up or agricultural land be brought under cultivation, this despised strip of land, over 24 acres to the mile, would be of great value. As an instance, attention is called to the land occupied for railroad purposes by the Atchison, Topeka and Santa Fe and Atlantic and Pacific Railroads in the present city of Albuquerque. That land, if valued at anything like the values of adjoining land of individual owners, must be considered as worth hundreds of thousands of dollars. Similar conditions undoubtedly exist in many other places.

Railroad Co. vs. *Baldwin, 103 U. S. 430.*

Appellees' Second Point.

It is cheerfully admitted that Congress knew the common law rule that fixtures attached to the freehold become part thereof; but it is denied that it intended, or ever dreamed of, any such application of that rule to fixtures to be placed by the railroad company upon its road, as would make them a part of the easement which it granted. As counsel state this point, they assume that "the soil, the rocks and the trees" compose the "right of way." This goes far toward assuming what they evidently consider the vital part of their case.

They insist that "right of way" means the same things as roadbed, track, bridges, etc., etc., but they are unfortunate in their quotation and authorities cited to sustain this position. On page 22 they quote from *Elliott on Railroads*, but that writer in that quotation plainly shows that he considers "right of way" as something other than roadbed, tracks, etc.

On page 24, of their brief, counsel for appellees quote from the case of *Joy* vs. *St. Louis, 138 U. S. 1*, to show that

a track is a part of the right of way. The question upon which the court was passing in the portion of the opinion from which this quotation is made, was as to whether a contract for the use of a right of way included use of tracks when existing tracks occupied the whole of the land covered by the right of way; and the court, including what is quoted in appellees' brief, spoke as follows:

> "The evidence shows that the entire right of way is occupied with tracks and sidings, so that there is no room for another and independent track, and that the entrance into the Union depot over the tracks of the Wabash Company, is the only practical route for the road of the Colorado Company, to that depot. As the Kansas City Company had the right to cover its right of way with main and side tracks so that there should be no room on such right of way for the tracks of any other railroad, it would be in its power to defeat the intent of the agreement if the right of way should be held not to include the tracks. Moreover, as the County company and the Kansas City company were tenants in common of the right of way through the park and to the east end of the cut, each company had the right to use the whole of the right of way, subject to the right by the other company to use the whole of it. Hence, the grant to other roads of the privilege of using the right of way applied to the whole of such right of way through the park, and not to a particular part of it. The track can not be separated from the right of way, the right of way being the principal thing, and the track merely an incident. A right of way is of no practical use to a railroad without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way."
>
> *Joy* vs. *St. Louis, 138 U. S.*

This has no application to anything in dispute in the present case. It does not tend to show that when Congress speaks of a "right of way" it was intended to include the

improvements which might at any time be placed on the land covered by the right of way.

On pages 24 and 25 of appellees' brief, appears a quotation from an opinion of Mr. Justice Brewer, bearing upon what is meant, and covered, by the term "right of way." It does not tend strongly to support appellees' position; and a little further along in the same opinion, in discussing the applicability of a statute of limitations, the learned judge uses language which shows how little foundation there is for that position, and expresses views with regard to the character of the interest which a railroad company has in the land over which it claims a right of way, which are the views of every lawyer unbiased by the exigencies of some particular case, as follows:

> "But it is urged that the statute only applies where the legal title is taken to land—where the fee is claimed; and that it does not apply to the case of an easement—a right of way. Well, your statute at the time these condemnation proceedings were had, authorized the appropriation of the fee or the use. I think it must be conceded, however, that, unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use. The record of those proceedings is not entirely clear, but I think the fair construction to put upon it is that the railroad was seeking to take no more than needed, and that was the easement—the use.

Keener vs. *U. P. R.R., 31 Fed., 128.*

Clearly, that court was not of the opinion that the right of way of a railroad company is "an estate in fee simple."

On page 25 of their brief, counsel for appellees quote from the opinion in *Railroad Co.* vs. *United States, 93 U. S. 442.* In that quotation it is said that:

> "The forms of legislative expression thus adopted and coming down from a period when they had

> greater practical significance than they now have, bring with them an established sense which renders them free from all uncertainty and doubt."

That is just what appellant claims about "right of way." It had "an established sense" which renders it "free from all uncertainty and doubt." What lawyer in 1866 ever imagined that "right of way" included roadbed, tracks, telegraph lines, station houses, etc.,—everything that might be fastened to the ground for the corporate purposes of a railroad company? The popular use of the phrase, as synonymous with land, has certainly grown up since that time.

On pages 26–7 of their brief, counsel for appellees refer to the case of *Milhau* vs. *Sharp, 27 N. Y., 620*, in which the court held void an ordinance giving a right to build a street railroad on Broadway, but the reason for such holding is not clearly or accurately stated in appellees' brief. They say it was—

> "because of the fact that upon building the road it would become permanently attached to and a part of the fee which the city authorities would thereby surrender the right to use for a public street."

This seems to indicate some confusion of ideas, because, so far as I can discover, the court did not so hold, but really declared the ordinance void because the city had no authority to grant such a franchise (*pp. 619–20*), and intimates that the fee of the street was not vested in the city (*p. 623*); and, in summing up the reasons for holding the ordinance void, the court says:

> "The resolution is, therefore, void, for the reasons that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the street which the common council had no power to convey; and to divest the corporation of the exclusive control of

> the street which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish." (*P. 622.*)

On page 27 of their brief, counsel for appellees refer to the case of *People ex rel.* vs. *Cassity, 46 N. Y. 46,* and say that—

> "the court held that the taxing officers had a right to tax the real estate upon which the superstructure was laid, and that necessarily the superstructure was included in such taxation as real estate."

This is erroneous. The court did not so hold, as will appear by reference to the opinion, all of the material portion of which will be found on pages 11–12 of appellant's original brief in this case.

At pages 28–9 of their brief, counsel for appellees cite five cases to sustain the proposition that the term "right of way," applied to railroads, has a very broad and inclusive meaning—so broad as to include large tracts of land covered with tracks, shops, depots, stock-yards, etc. These cases are so cited upon a material proposition as to require some notice. They are:

C. & A. R. Co. vs. *Dennison, 98 Ill., 350.*
Pfaff vs. *Railroad Co., 108 Ind., 144.*
Railroad Co. vs. *Cass County, 76 N. W., 239.*
State vs. *Railroad Co., 35 N. J. L., 537.*
Railroad Co. vs. *Venango County, 38 Atl., 1088.*

In the Illinois case the court held that the right of way included thirty-two acres of land covered with tracks and other railway property, because the statutory definition of a railroad right of way required it. That statute is quoted by the court at page 356, and is as follows:

> "Sec. 42. Such right of way, including the superstructures, with main, side or second track and turnouts, and the station and improvements of the

> railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof, as a strip of land extending on each side of such railroad track and embracing the same together with the stations and improvements thereon."

What has a decision, under such a statute, to do with the meaning of the term "right of way" in the present case?

In the Indiana case, the decision is the same as in the Illinois case, under a statute almost exactly the same, and so declared to be by the court at page 151, where it is said to be the same as the Illinois statute in every material feature.

The North Dakota case, reported in *76 N. W.*, was one in which the question decided was as to the construction of language in the constitution which declared that certain property of railroad companies should be assessed by the state board of equalization; and the court gave the word "roadway" a very broad meaning so as to include everything used in connection with the actual operation of the road. The very question involved in the present case, as to whether improvements can be assessed separate from land, was argued, but the court refused to pass upon it, as being unnecessary to its decision of the case, but there is nothing about "right of way."

In the New Jersey case the controversy was as to taxing land and a branch road leading to it, the land having been purchased by the company for the gravel which was on it, to be used in ballasting the road, the statute of the state having provided a percentage method of taxation of the railroad company, and declared "that no other or further tax or imposition shall be levied or imposed upon said company," (*p. 538.*) There was some dispute as to whether the

gravel-pits and branch road were necessary or merely convenient; and the court held that they approximated to pure necessity, (*p. 547*) but said that necessary meant what was "suitable and proper to accomplish the end that the legislature had in view." There was no attempt to broaden the ordinary meaning of right of way, nor was any such question involved.

The Pennsylvania case, reported in *38 Atlantic*, merely decides the point that a shop for repairs in the business of the railroad company was a necessary part of the equipment of the railroad, and therefore not taxable by local authority, such property being taxable by the state, although a shop for the construction of locomotives and cars would be taxable by local authorities, as had been previously decided in other cases.

It may well be asked, what have any of these cases to do with the proposition which they are cited to support?

Appellees' Third Point.

This is the most important point to appellees' case, although they declare that they regard it as "a matter of very little importance."

They assert that Congress intended that the right of way "should be an estate in fee simple." (*Page 32 of their brief.*)

As to the case of *Railway Co.* vs. *Roberts, 152 U. S. 114*, upon which appellees so greatly rely, and the only one in which a word can be found even *seeming* to support their contention, in addition to what is said in appellant's original brief, at page 8, attention is called to the fact that an examination of the opinion of the Supreme Court of Kansas in the same case, clearly shows that the question involved was as to the right of possession only, and that the case stood in the state courts exactly as actions of ejectment stand almost everywhere, as one brought to recover possession of the land, although, of course, a claim of title might incidentally arise in determining the right of possession. All

that was necessary, however, to the decision of the case was, as Judge Ross holds, in effect to pass upon the question as to whether the railroad company had a right to the exclusive possession of the land without regard to the grade of its title.

R. W. Co. vs. *Roberts, 43 Kan., 103 et seq.*

On page 34 of appellees' brief, quotation is made from the syllabus of a California case to show that the grant of a right of way to a railroad company is not the grant of "a mere easement." The statement in that syllabus that the act of Congress "did not grant a mere easement for the construction and operation of its road," does not appear in the opinion of the court. All that was decided was that the act made "a special grant of a right of way two hundred feet in width on each side of the road," and that the company was entitled to the exclusive possession of the land so described, and could therefore maintain an action of ejectment to recover that possession.

R.R. Co. vs. *Burr, 86 Cal., 279.*

In support of their contention that by the definite location of the line of the Atlantic and Pacific Railroad, an estate in fee in the land included in the "right of way" vested in the company, appellees cite, at page 36 of their brief, the case of *R.R. Co.* vs. *Alling*, in which this court, through Mr. Justice Harlan, speaking of what was intended by Congress in granting a right of way to a railroad through the public domain, declares, as any lawyer naturally would—

> "that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and in good faith appropriated for the purposes contemplated by the charter of the company and the act of Congress."

R.R. Co. vs. *Alling, 99 U. S., 475.*

In this case the court held that the Denver and Rio Grande Railway Company had a prior right to a right of way through the Grand Cañon of the Arkansas, subject to the right of another company to use the same right of way, and even the same track in narrow places where two tracks would be impracticable. This latter right was in consequence of a later act of Congress, and the court refused to pass upon the question as unnecessary, as to—

> "whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the Act of March 3, 1877, had that company actually located and constructed its road in or through the Grand Cañon within five years after the passage of the Act of June 8, 1872."
>
> *Same case, p. 480.*

This would indicate that it was at least a debatable proposition as to whether the grant of such a right of way by Congress to a railroad was absolute, as claimed in the present case, because if the grant were of that nature, there could be no pretense of later control by Congress; and it also shows that "right of way" does not include track.

The other cases cited on page 36 of appellees' brief do not tend to support their position or to assist in the elucidation of the questions involved.

In this connection attention must again be called to the case, already cited, of

Keener vs. Railroad Co., 31 Fed. 128.

This court in considering the effect of deeds conveying land as a right of way to a railroad company for the purpose of establishing a railroad thereon, said:

> "The right granted was merely a right of way for a railroad. It was granted to an existing corporation which had a franchise. The grant to the 'assigns' of the corporation cannot be construed as extending to any assigns except one who should be the assignee

of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words 'forever in fee simple' enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law, or separate from the franchise to make and own and run a railroad. The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired is merely an easement on the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor. By the terms of the charter of the Lafayette Branch Company, it was given the power to purchase, hold, lease, sell and convey real, personal and mixed property, so far as it should be necessary for the purposes mentioned in the act, namely, to construct and operate the specific railroad authorized therein, with power to 'lay and collect toll from all persons, property, merchandise or other commodities transported thereon.' By the terms of its charter, therefore, in connection with the terms of the deeds of the right of way, that right was indissolubly linked to the franchise, and to the purpose of the existence of the corporation, and to its public functions, so long as they shall exist. It would violate not only the expressed intentions of the grantors in the deeds, but the manifest purpose of the legislature of Alabama, to permit a private person to seize and appropriate the right of way by the purchase of anything at a judicial sale apart from the franchise on which the right of way was dependent. The sheriff's deed purported to convey in words, 'the said tract of land or railroad-bed, to wit: the right of the Opelika and Oxford Railroad, so far as the right of way has been obtained, from Lafayette to the edge of Lee County, and all the appurtenances belonging to said road from Lafayette to the line of Lee County.' If the deed undertook to convey any land or soil or road-bed, it conveyed with it the right of way. The

> deed, in reciting the levy, states that it was made 'on the following tract or lot of land as the property of the said railroad company, to wit: the right of way,' etc., and states that that was what was sold. It was not lawful for the purchasers to have a deed of the right of way, and if they obtained a deed of anything, the right of way was included, or else they received nothing beyond, perhaps, a right to carry away from the land what the company had put upon it."
>
> *East Alabama R. Co. vs. Doe, 114 U. S., 350–1.*

The words of conveyance in the deeds under consideration in the above case were certainly stronger and better calculated to convey an estate in fee than those to be found in the second section of the act of Congress of 1866.

Appellees' Fourth Point.

This is to the effect that the exemption of the "right of way" exempted all improvements which Congress intended should be placed thereon. In other words, as shown by the whole brief, appellees contend that "right of way" is the same thing as, or includes, in the words of the assessment in case No. 106, "the improvements, cross-ties, rails, fish-bar plates, bolts, bridges, culverts and structures together with the telegraph line" of the company, and all "station houses, shops, depots, switches, water tanks and improvements" at the different towns on the line. This is not in harmony with the unvarying rule of this court as to strictness of construction of exemptions from taxation, but the appellees have assured the court that this rule does not apply to them.

The authorities cited by appellees in support of this point are all cases where state courts have shown some liberality in the construction of exemptions from taxation, holding that general words of description of exempt property include all the particular things which can possibly belong to the general description. It is doubtful, to say

the least, whether this court would ever go as far as some of these cases, but none of them hold that a narrow, particular term of well-known, limited, time-honored significance, such as "right of way," can, by construction, be so expanded as to include everything connected with the land over which the right of way may be exercised.

On page 41 of their Brief, by dovetailing a contention of counsel with the language of the court, counsel make it appear that the supreme court of Massachusetts, in *Inhabitants of Worcester* vs. *Railroad Co., 4 Met., 564*, decided that "right of way" included the structures on the land; but an examination of the opinion will show that the court decided nothing of the sort.

The opinion of the learned Chief Justice of the supreme court of New Mexico, which is highly commended in appellees' Brief, reads very beautifully, and if mere form were sufficient, would be very convincing. He says that Congress tendered the inducements it deemed sufficient to secure the construction of the railroad—

> "not the right of way over the land, but the right for a railway; not the right to the soil only, but the right to the roadbed; not the right to the roadbed only, but to a roadbed equipped with ties and rails, to constitute a railway over which cars could be conducted for the lawful purposes of the government; not only the right to a roadbed so furnished, but to a railroad provided with the fixtures essential to the fulfillment by the corporation of the purposes for which it was created." (*Record in No. 106, p. 72.*)

From all this he draws the conclusion that Congress also intended to exempt from taxation all the inducements which it tendered. But why stop where he does? Of what use would the railroad be at the point at which he leaves it? Until equipped with a thousand locomotives and ten thousand railroad cars it would be of but little practical value. Why not add all the rolling stock and every other appli-

ance necessary or convenient to the full, complete and profitable operation of the railroad to the other things which it is assumed Congress intended to offer, and by the same sort of illogical reasoning reach the conclusion that, when the right of way was exempted from taxation, that exemption must extend to all these other things which Congress ought to have had in contemplation?

The learned counsel for appellees are clearly opening the way for this claim of exemption, and, if they can lead this court to the point of declaring as they contend, that the railroad and telegraph line are only parts of the right of way, which is exempt, they can confidently go before the local tribunals of Arizona and New Mexico, and there contend that the railroad being exempt from taxation, this exemption must extend to everything used in the operation of the road, whether rolling stock, hotels, warehouses or anything else however remotely connected with the business of the company, and will rely upon such authorities as are cited on pages 37 to 42 of their brief in this case, which show that some state courts have thus held with reference to such exemptions.

Appellees' Fifth Point.

This needs but little attention. Appellees urge that the neglect of the territorial officers to assess this property for a number of years is a practical construction of the statute which estops their successors. This sort of argument was made to this court in the cases of *R.R. Co.* vs. *Dennis, 116 U. S.*, and *R.R. Co.* vs. *Thomas, 132 U. S.*, in the first of which there had been an omission by the state officers to assess for twenty-five years, but the court held that this fact could not—

> "control the duty imposed by law upon their successors, or the power of the legislature or the legal construction of the statute under which the exemption is claimed."

Moreover, if such an argument were sustained, we would have the incongruous and ludicrous result that in one of the territories this property would go untaxed because its officers were negligent; while in another, Arizona, it would be taxable because there the officers had been earlier aware of their duty.

A. & P. R.R. Co. vs. *Lesueur, 19 Pac., 157.*
A. & P. R.R. Co. vs. *Yavapai County, 21 Pac., 768.*

As to the case of *Northern Pacific Co.* vs. *Carland, 5 Mont., 146*, it must be admitted that the court of Montana did say that the exemption of the right of way extended to such property as is sought to be taxed in the present cases; but it is equally true, as pointed out by the supreme court of Arizona in the case above cited, that this part of the Montana opinion is *obiter dictum*, entirely unnecessary to the decision of the case. It is to be noted that even the Montana court declared the right of way to be an easement.

Appellee's Sixth Point.

Here the position is taken by appellees that there is no statute of New Mexico which authorizes the assessment of the superstructure for taxation separate from the right of way.

Sections 2807 and 2834 of the Compiled Laws of 1884, which are quoted on pages 45 and 46 of appellees' brief, certainly contain the authority which appellees deny. In section 2807 it is declared that "real estate" includes "improvements," and that "improvements" includes—

> "all buildings, structures, fixtures and fences erected upon or affixed to land, *whether title has been acquired to said land or not.*"

Section 2834 requires the assessor to make out an assessment book, "with appropriate headlines," which must contain among other things "the several species of property and the value as hereinbefore indicated." Certainly "im-

provements" is one of the said "several species of property," and the assessment books in New Mexico, ever since the enactment of the statute in 1880, have always been made to show "Value of Land" and "Value of Improvements" separately. The form will be found in the Record in case No. 106, between pages 42 and 43.

There is no reasonable doubt of the meaning of the statute, but, if there were, this would be a proper matter to which to apply the doctrine of practical construction of a statute by the officers entrusted with duties under that statute, and the authorities cited by appellees under their "Fifth Point" would be appropriate.

Moreover, statutes of this kind are entitled to a most liberal construction for the purpose of preventing the escape from taxation of any property which ought to bear its share of the expenses of government. Authorities need not be cited in support of this well-established rule.

On page 47 of their brief, counsel for appellees seek to deprive the case of *San Francisco* vs. *McGinn, 67 Cal., 110*, of all weight by pointing out that the constitution of California, which went into effect in 1879, requires that "lands and the improvements thereon shall be separately assessed." It is impossible to see how this provision can affect the value of the decision in the case cited, if it had any bearing upon it; but an examination of the opinion will show that it was not based on that constitutional provision and could not properly have been so, as the lease under consideration had been made in 1875, four years before the constitution of 1879 went into effect. This case is fully quoted from in appellant's original brief at pages 12–13.

In addition to the cases heretofore cited by appellant, on this point, attention must be called to some New York decisions under a statute similar to the New Mexican statute. The New York statute reads as follows:

> "Sec. 2. The term 'land' as used in this chapter, shall be construed to include the land itself above

and under water; all buildings and other articles and structures, substructures and superstructures erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges; all telegraph lines, wires, poles and appurtenances; all surface, underground or elevated railroads; all railroad structures, substructures and and superstructures, tracks and the iron therein; branches, switches, and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street, or grounds; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place; all trees and underwood growing upon land; and all mines, minerals, quarries and fossils in and under the same except mines belonging to the state. The term 'real estate' and 'real property' wherever they occur in this chapter shall be construed as having the same meaning as the term 'land' thus defined."

2 Rev. Stat. N. Y. 7th Ed., p. 981.

With the above quoted statute in force, a case was decided in the court of appeals in which it appeared that the relators rented land from the Brooklyn Benevolent Society and erected buildings thereon. The real and personal property of the society was by statute exempt from all taxation whatsoever, except for local improvements, so long as the revenues should be disposed of according to the directions of the charter. It was held that the exemption did not extend to the buildings, but they must be assessed as the property of the relators, although the land to which they were affixed was exempt from taxation; and it was argued by counsel, as in the present case, that they had become a part of the realty, and were consequently exempt from taxation.

People ex rel. vs. Assessors, 93 N. Y., 310–313.

It is to be noted that there was nothing in the statute,

any more than in the New Mexican statute, in terms authorizing the assessment of improvements separate from the realty to which they are attached; but the judges of the court, disregarding precisely the same argument now urged here by counsel for appellees, found no difficulty in holding that they could and should be so assessed.

In another New York case, decided under the same statute, the plaintiff sought to have assessments of taxes declared void on the ground that they were a cloud on his title. It appears that he was the owner of a wharf erected on certain land which had been granted by the city in 1852 for the purpose, and was then under water, which wharf was to be a public wharf, but as to which the grantees had a perpetual right to collect wharfage, etc. The court said that, under the statute above quoted, upon the assumption that the fee to the land under water, upon which the pier was constructed, was reserved to, and remains in, the city, yet the pier was real estate for the purpose of taxation. Referring to the statute, the court said:

> "Under the definition of land thus given, one may be taxed as owner of the fee of land, and another for the trees, buildings and other structures thereon, and the mineral and quarries therein."
>
> *Smith* vs. *The Mayor, 68 N. Y., 554.*

It is somewhat difficult to understand why counsel for appellees, on page 47 of their brief, cite two decisions of this court, reported in *118 U. S.* and *127 U. S.* In the first one, on the point of the invalidity of an assessment, the court said:

> "The case, as presented to the court below, was, therefore, one in which the plaintiff sought judgment for an entire tax arising upon an assessment of different kinds of property as a unit—such assessment including property not legally assessable by the state board, and the part of the tax assessed against the latter property not being separable from

the other part. Upon such an issue, the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied."

Santa Clara vs. *Railroad Co., 118 U. S., 394.*

The other case is to the same effect; but what has this to do with the case under discussion? There was no such assessment as in California; but, on the contrary, appellees complain that we have been too specific and definite in our assessments.

Appellees' Seventh Point.

Here is an attempt by appellees to reverse and overturn the whole doctrine of this court on the subject of exemptions from taxation. Instead of requiring the claimant to show beyond a doubt that he is entitled to such exemption, the taxing power must assume the burden of making it clearly appear that it has the right to assess the property which seeks to escape its due share of the burden of taxation.

In this proposition is involved the assumption, hereinbefore referred to as running through the whole of appellees' argument, that there is something so inferior about a Territory that a different rule is to be applied to a controversy between it and this railroad from what would be proper if the controversy were with the national government. There is no foundation for this assumption and nothing can be found in the brief of appellees to justify it.

As to this, appellant again refers to what appears in its original brief at pages 16 to 23, to which no answer has been made.

On page 50 of their brief counsel for appellees cite ten cases, the array of which looks quite formidable, but, upon close examination, they do not seem to have much bearing on the present case, nor to support the "Seventh Point" under which they appear.

The first case cited is one in which this court held that a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act, such repealing act being void under that clause of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

New Jersey vs. *Wilson, 7 Cranch, 164.*

Appellees cite another case in which this court decides that a general banking law enacted by the State of Ohio in 1845, which required officers of banks to make semi-annual dividends, and the payment of six per cent. of such dividends for the use of the State which should be in lieu of all taxes to which the bank would otherwise be subject, made a contract fixing the amount of the tax, and could not be changed by a subsequent legislature.

Bank vs. *Knoop, 16 How., 369.*

Appellees cite, also, two other cases which decide precisely the same point under the same statute.

Dodge vs. *Woolsey, 18 How. 331.*

Jefferson Bank vs. *Skelly, 1 Black., 436.*

Appellees cite also a case in which this court decides that a State authorizing a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, constituted a contract within the meaning of the Constitution, and that the authority can not be withdrawn until the contract is satisfied.

Von Hoffman vs. *Quincy, 4 Wall., 535.*

They cite also a case in which it is held that an exemption of the property of a corporation from taxation becomes

a contract after the corporation is organized, and its obligation can not be impaired by subsequent State legislation.

Home of the Friendless vs. *Rouse, 8 Wall., 430.*

They cite also a case in which this court holds that a charter of incorporation granted by a State creates a contract which the State can not violate; and that the exemption from taxation by such a charter of the property of a railroad company covers its franchise and rolling stock, the franchise being property as much as anything else.

Railroad Co. vs. *Reid, 13 Wall., 264.*

They cite another case which declares the same rule as to the nature of such a legislative contract with a corporation, but an earlier general statute, subjecting all charters to amendment, alteration or repeal, was held applicable and really a part of the contract, so that the State legislature had power to change the charter.

Tomlinson vs. *Jessup, 15 Wall., 458–9.*

They cite also two cases from Ohio which hold that where the State by the act incorporating the Ohio University gave that institution land and authorized perpetual leases of the land, the leased lands to be forever exempt from taxes, the acceptance of leases constituted a binding contract between the State and the lessees which can not be impaired by subsequent legislation attempting to tax the lands.

Matheny vs. *Golden, 5 Ohio St., 361.*
Kumler vs. *Traber, 5 Ohio St., 442.*

Appellees' Eighth Point.

Appellees admit that there is one case opposed to their contention, but their comments upon it indicate that they have given it but little attention, probably because they

consider it of little importance. They say, on page 51, that, in that case, the court finds—

> "that the 'right of way' is an interest in realty, and that the superstructure placed upon it became part of this 'right of way,' and then proceeds to hold that the exemption from taxation of the 'right of way' did not exempt the superstructure, because of the fact, so far as one can determine, that there was no express exemption in the act, of the superstructure as such."

A more inaccurate statement of the effect of the admirable opinion referred to can hardly be imagined. It is correct only so far as it states that the court holds that the right of way is an interest in realty. It does not hold that the superstructure became part of the right of way. If it did, of course there could be but one conclusion, and that in favor of the railroad company. The attention of the court is most earnestly invited to this opinion, as being clear, well reasoned and convincing on every material point now in controversy. Appellees urge that the opinion is unworthy of respect because it holds that the Territory has power to tax the franchise of the company. The only reason suggested against such power is that this court has held that a State can not tax the franchise of a corporation which is a national agency, although it may tax its property, but appellees here ignore the argument as to the character and power of the territorial governments upon which appellants rely, and to which no answer has been, or can be, made. Congress could tax such franchise, and it has delegated its taxing power to the Territory without any limitation as to franchises. In New Mexico no attempt has been made to tax the franchise.

Counsel for appellees further state, on page 51 of their brief that this Arizona case and one from *60 Me.*, constitute the entire authority of appellant for its proposition that the superstructure is not a part of the "right of way." This

is an error. Appellant has cited, in its original brief, the cases of—

People vs. *Casity, 46 N. Y. 48–50.*
People vs. *Commissioners, 82 N. Y. 462–3.*
San Francisco vs. *McGinn, 67 Cal. 110.*
People vs. *Shearer, 30 Cal. 656.*
Crocker vs. *Donovan, 30 Pac. 377.*
Turney vs. *Saunders, 4 Scam. 527.*
Gold Hill vs. *Caledonia Co. 5 Sawy. 575.*
A. & P. R. Co. vs. *Lesueur, 19 Pac 159.*
Portland R. R. Co. vs. *Saco, 60 Me. 196.*

Upon this point, appellant has cited in the present brief, the cases of—

Smith vs. *The Mayor, 68 N. Y. 554.*
People vs *Assessors, 93 N. Y. 310–313.*

It is insisted that these cases are all pertinent, strongly persuasive, and entitled to great weight in the consideration of this question.

A statement is made on page 54 of appellees' brief, that in the assessments in Valencia County penalties of one-fourth of the assessed value have been added. This is a mistake, as will appear by reference to the assessments themselves at pages 80 to 84 of the printed Record in case No. 169. The records do not disclose any disposition to oppress or unfairly to treat the railroad company. No complaint has been, or can be, made as to the valuation of its property. The assertion of the claims of the Territory in these proceedings was made necessary by the foreclosure suit, as a matter of fairness and justice to any one who might purchase the property under the decree of the court.

Appellees' Final Point.

The proposition here is that the clause as to exemption from taxation, contained in the second section of the act of Congress of 1866, about which this whole controversy has

heretofore been carried on, is of minor importance, or rather of no importance, because the Territory cannot tax the railroad at all for the reason that the government, by virtue of the provisions of the eleventh section of the act, has such a proprietary interest in the property as to exempt it entirely from taxation. This is no more startling than the discovery by appellees of the all-inclusive meaning of the innocent-appearing common law phrase, "right of way."

But little need be said about this. There is no attempt to tax the interest of the government, whatever it may be, nor to proceed in any way so as to diminish the value of that interest; and the reasoning of this court, in the opinion from which quotation is made, at pages 57 and 58 of appellee's brief, strongly supports the right and power to tax the visible property of the railroad company.

Enforcement of the Tax.

Counsel for appellees repeatedly express great apprehension as to the disastrous effect of sustaining the taxing power of the Territory, because, as they assume, the only possible way of enforcing the payment of the tax is by a sale of a section of the railroad, which would in effect destroy it. They refer to the doctrine that "the power to tax involves the power to destroy," and seem apprehensive that this destruction will be brought about in the manner above indicated in compelling payment of taxes. This is not the "power to destroy" included in the power to tax; but a moment's reflection, and a brief examination of the law, will show how little ground there is for the fears of appellees.

The section of the New Mexican statutes as to taxes being liens is as follows:

> "Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the

> date of the levy thereof; and taxes due from any person upon personal property shall not be satisfied, nor the lien removed, until the taxes are abated or paid, or the property sold for the payment thereof. The tax list and warrants hereinbefore provided for shall have the force and effect of an execution against the person or property assessed."
>
> *Compiled Laws of New Mexico, 1884, Sec. 2849.*

The tax list being, in effect, an execution against the property assessed, we are led to consider what may be sold under an execution against a railroad company. The law is so well summarized in a recent work on railroads that it will suffice here to quote it:

> "The franchise of a railroad company and corporate property essential to the enjoyment of the franchise are not subject to sale upon execution unless the legislature authorizes or assents to the transfer. But locomotives, cars and other personal property held by the corporation, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution, and there seems to be no reason why the property of a railroad corporation not essential to the enjoyment of its franchise, should not be subject to the payment of its debts."
>
> *2 Elliott on Railroads, Sec. 520 and cases cited,* especially *Gue* vs. *Canal Co., 24 How. 262–3.*

Whatever differences in the decisions of other courts there may be upon this question, as to what may be levied upon under an execution against such corporations, so far as this court is concerned there is no departure from the rule laid down in *24 Howard, 262*, above cited, which is certainly a proper rule, and one which will prevent any such dreadful consequences to this corporation as are conjured up by the too lively imagination of counsel for appellees.

No reason can be assigned for permitting this tax list execution to go beyond the scope of any other execution,

and appellees might just as well protest against the propriety of permitting judgments in ordinary actions against the railroad company. The courts will not permit the dismemberment of the railroad, nor will the Territory be compelled to resort to such mutilation to collect its debts.

East Alabama R. Co. vs. *Doe, 114 U. S. 350.*

It is respectfully submitted that the defenses set up by appellees are not well founded in law; that no sufficient answer has been made to the case of appellant; that the contentions of appellees amount only to a desperate effort to confuse the simple issues involved, and to escape the application to them of clear and well established principles.

F. W. CLANCY,
Counsel for Appellant.

Nos. 106, 169 & 170.

PETITION FOR REHEARING

Supreme Court of the United States

OCTOBER TERM, 1898

TERRITORY OF NEW MEXICO,
APPELLANT,

vs.

UNITED STATES TRUST COMPANY,
OF NEW YORK, ET AL.

NOS. 106, 169
AND 170.

APPEAL FROM NEW MEXICO.

E. W. CLANCY,
Solicitor for Appellant.

NEW MEXICAN PRINTING CO., SANTA FE, N. M.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Nos. 106, 169 and 170.

Territory of New Mexico vs. United States Trust Company et al.	Appeal from New Mexico.

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Territory of New Mexico, appellant in the above entitled causes, respectfully prays the court to order a re-hearing of said causes for the following reasons:

First. In determining the character of the estate taken by a railroad company under the name of a "right of way," the court has apparently overlooked its earlier, applicable decisions, with which the holding in this case is in irreconcilable conflict.

Second. The court appears not to have considered the argument that in 1866, when the act of Congress was passed, and for years thereafter, no such meaning had ever been given to the phrase "right of way," as is now claimed for it.

Third. The application to this case of the common law rule that whatever is affixed to the soil becomes a part thereof, is essential to the decision of the court; but this proposition has not been discussed by counsel for appellant on the oral argument or in the briefs, and there is a large number of adjudications bearing on this question adverse to the conclusion of the court, to which the attention of the court has not been called and which the court evidently has

not considered, so that upon a rehearing it is quite possible that the court would find the weight of authority and reasoning so strongly against the application of that rule to such fixtures as are in question herein, as to lead to a different result.

Fourth. The court has failed to notice a material difference between cases Nos. 106 and 170, which relate to taxes in Bernalillo County, and case No. 169, which relates to taxes in Valencia County, the difference being that in Valencia County only a little over one-third of the railroad runs over what was public domain at the time the act of Congress was passed, and only that portion can be considered as exempt under Section 2 of the act, separate assessments having been made of these different portions, as will be seen by reference to pages 80 to 84 of the record.

And your petitioner respectfully submits herewith, as part hereof, the accompanying statement, more in detail, of the foregoing grounds for a rehearing.

TERRITORY OF NEW MEXICO.
By F. W. CLANCY,
Solicitor for Appellant.

I hereby certify that I have examined the record and decision of the court in these cases and am of opinion that this application for a rehearing is well-founded, and should be granted.

F. W. CLANCY,
Counsel.

STATEMENT OF REASONS FOR A REHEARING.

The rules of the court permit applications for rehearing, but the practice of making such applications is not one in which counsel should often indulge. The invitation extended by the rules is, of course, based upon the possibility of error in the conclusions of the court, and its desire, so far as is possible in any finite institution, to eliminate such error. As a rule counsel should not, however, after once having had an opportunity to present their case, ask for rehearing unless they are quite certain that the decision of the court is wrong, and believe that the court has not had its attention drawn to matters the consideration of which would, or might, lead to a different result; but having such certainty and belief, it is a duty to the court, as well as to clients, to make a presentation of their views. It is proper to say this, in order that the court may understand the spirit in which this application is made in these cases, the success of which will depend only upon the ability of counsel. If the reasons which exist for a rehearing can be fully and clearly set forth, it will be allowed, while failure will indicate merely incapacity so to state the law as to bring it fully before the court. The lack will be in the man, not in the cause.

It is not intended herein to reargue the case under the guise of a request for a rehearing, but to confine this argument to its legitimate scope. To do this it will be well first to set out what the court has decided.

The opinion of the court may be fairly condensed as follows:

> 1. Congress, in granting a right of way to the Atlantic and Pacific railroad company, in 1866, intended to give, not a mere easement as the phrase would ordi-

narily imply, but either an estate in fee simple or surely more than an ordinary easement, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal property; and this because what was granted is exactly measured as a physical thing and because the possession of the railroad company must be practically exclusive.

2. The interest granted being real estate of corporeal quality, the common law rule that whatever is erected upon realty becomes a part of it, is applicable, and therefore the property sought to be taxed in this case must be considered a part of the "right of way" and consequently exempt from taxation under the letter of the statute.

In addition to this the court is careful to say, however, that it does not intend to depart from the rule of construction heretofore laid down by this court in former cases, and that that rule is not impaired by the present decision which "simply rests on the terms of the statute."

The former decisions of the court in this class of cases establish, as governing rules,

That "exemptions from taxation are to be strictly construed;"

That "when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power" to tax;

That "there must be no doubt or ambiguity in the language used upon which the claim to exemption is founded;"

That "no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power;"

That "the existence of a well founded doubt is equivalent to a denial of the claim."

It being understood that in these rules are to be found our guides as to the construction of statutes containing exemptions from taxation, it is obvious that all which the appellant in the present cases needs to do, is to show that the language of the act of Congress "admits of reasonable con-

tention," or to demonstrate "the existence of a well founded doubt" as to the correctness of either of the positions taken by the court in its opinion. If it shall appear to the court from the present application that there is any chance, upon a rehearing, of appellant's being able to show the existence of a well founded doubt, or that the language of Congress admits of reasonable contention, it is clear that the opportunity should be given for it to do so.

I.

In determining the meaning of the phrase "right of way" as applied to railroads, the court appears to have overlooked its own earlier, applicable decisions.

The section of the act of Congress as to which this controversy arises is as follows:

> Sec. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific railroad company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States.

It will be seen that the act of Congress grants a right of way through the public lands, to the extent of 100 feet in width on each side of the road, and this right of way is granted "for the construction of a railroad and telegraph as proposed." There is no reason for applying to the words of conveyance in the act of Congress, for the purpose of sustaining a claim of exemption from taxation,—a purpose contrary to the settled policy of this court,—any different or other rule of construction from that which is applicable to words of conveyance in a deed. There are numerous cases which have been adjudicated in the courts of this country where deeds of the most absolute and complete character, so far as their language is concerned, have been declared to convey to railroad companies mere easements when the land conveyed was for the purpose of building a railroad. One of

the most noteworthy of these cases is one decided by this court and reported in 114 U. S. It is absolutely beyond the power of human ingenuity to reconcile the decision of this court in that case with its opinion in the present case. All of the reasons urged in the present case for holding that Congress in granting the right of way to the railroad company granted an estate in land which was more than a right of way as known to the law in 1866, would apply with equal force to the deeds of conveyance to the Opelika and Oxford railroad company. A railroad company in Alabama was for the purpose of constructing a railroad of the same character and nature as a railroad anywhere else, for the purpose of carrying on the same kind of business, and with similar rights and powers; it would, so far as its right of way is concerned, quite as much as the Atlantic & Pacific railroad company, have a right to exclusive use and possession, and its right would be perpetual, attributes to which this court in the present case gives great importance in determining the meaning of the phrase "right of way." And the right of way conveyed to the Alabama company was "exactly measured as a physical thing, not as an abstract right," just as this court now says of the grant to the Atlantic & Pacific company. The precise point was urged upon the court by counsel in the earlier case and was distinctly and emphatically passed upon. The court used the following clear and unmistakable language:

> "The right granted was merely a right of way for a railroad. It was granted to an existing corporation which had a franchise. The grant to the 'assigns' of the corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words "forever in fee simple" enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law or separate from the franchise to make and

> own and run a railroad . The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired is merely an easement on the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor."
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> *East Alabama R. Co. vs. Doe, 114 U. S., 350.*

In the case just cited, reference to the brief of counsel for defendant in error will show that the question was directly raised and necessarily involved as to whether the railroad company took anything more than an easement under the deeds which by their language appeared to convey so much. The attention of the court is invited to a comparison of the language of the deeds, and of the act of Congress. In the Alabama case the court says all that the company acquired was "merely an easement on the land;" while in the present cases, it says that surely more than an easement, if not the fee itself, was granted.

Both decisions cannot be right, and it is respectfully submitted that the court should adhere to what has been the unchallenged ruling of the court for nearly fourteen years.

There is another and still earlier case decided by this court, to which no reference is made in the opinion, which is quite as difficult of reconcilement with the present decision as is the case of the *Railway Company vs.Doe.* In that case the court had under consideration "the proper construction of the act of June 8, 1872, 17 Stat. at L. 339." That act granted to the railroad company,

> "The right of way over the public domain, one hundred feet in width, on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops and other buildings for railroad purposes, and for yard room and side tracks not exceeding 20 acres at any one station, and not more than one station in every ten miles, and the right to take, from the public lands adjacent thereto, stone, timber, earth, water and other material required for

the construction and repair of its railway and telegraph line."

It will be seen that this right of way was granted in substantially the same terms as the grant to the Atlantic & Pacific railroad company. Now as to the proper construction of this act this court, speaking through Mr. Justice Harlan, said:

> "That act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and branches. In this view, and having due regard to all the circumstances and condition of the company, when the act was passed, we do not doubt that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the charter of the company, and the act of Congress."
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> *R. R. Co. vs. Alling, 99 U. S. 475.*

It is certainly difficult to understand how Congress could have two such entirely different intentions, in 1872 and 1866, as this court ascribes to it by its opinion in the above cited case of *Railroad Company vs. Alling* and in the present case, when the language is substantially the same in the two different acts. If Congress, as this court decided, by the act of 1872 intended "to grant to the company a present *beneficial easement*," by what mode of reasoning ought we to impute to Congress an entirely different intention in the earlier act of 1866?

In this connection attention is called to the views of Mr. Justice Brewer, expressed before he became a member of this court, when he declared, with regard to condemnation proceedings, that,

> "Unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use. The record of these proceedings is not entirely clear, but I think the

fair construction to put upon it is that the railroad was seeking to take no more than was needed, and that was the easement—the use."

Keener vs. U. P. R. R., 31 Fed., 128.

Certainly these views are not in harmony with the reasoning of the court in the present case as to the nature and character of railroad business forcing the conclusion that more than an easement is needed for a railroad. They are the views which a lawyer would naturally entertain, while the opinion of the court here is an innovation upon long-established ideas, and with the result of sustaining a claim of exemption from taxation, a result which this court has heretofore sought in every possible way to avoid.

May there not be here some "well-founded doubt" which this court says "is equivalent to a denial of the claim?" Is it not true that "the language used admits of reasonable contention?" Is there not in the decision of the court something like the indulgence of a mere "implication" which leads to "construing the language used as giving the claim for exemption where such claim is not founded upon the plain and clearly expressed intention of the taxing power?" For if Congress had intended to exempt the railroad and telegraph line from taxation, could it not, and would it not, in terms have clearly expressed that intention, without leaving it to be evolved by implication and by attributing a new meaning to an old and well-understood term of the common law?

Undoubtedly a conveyance of the railroad of the Atlantic & Pacific railroad company, would carry with it the roadbed, ties, rails, bridges, culverts and everything of that sort, and also the "right of way;" but it cannot be said logically that the "right of way" must include the railroad and all the other things. The right of way is a part of the railroad, but the railroad is not a part of the right of way. This statement seems sufficiently self-evident; but the court has held in substance that a railroad and telegraph

line are mere additions to, and therefore a part of, the "right of way" of the company.

Now, if this ruling is to stand, we will be introduced to this sort of controversy: The right of way includes the railroad; exemption of the right of wayfrom taxation exempts the railroad from taxation; exemption of the railroad from taxation includes everything necessary to the operation of the railroad, and numerous authorities can be found to support this view and to extend the exemption of a railroad from taxation to everything necessarily used in connection therewith, and in many cases even to those things which are merely convenient to the use of the railroad.

II.

In determining the meaning of the phrase "right of way" as applied to railroads, the court is at variance with the great mass of authority in the United States.

A few of the decisions on this point were cited in the brief for appellant heretofore filed in this case, and attention is now again called to them, and, somewhat in detail, to a few others out of the great number which can be found in the reports of the various states.

In Michigan the court had under consideration a deed of which the granting clause was as follows:

> "All that certain piece or parcel of land situate, * * * and described as follows, to-wit: The right of way for a railroad running from the marl bed of said cement company to their works, on the west side of Kalamazoo River, and described as follows: 'A strip of land forty feet wide; * * * and being nine hundred fifty-two feet in length."

It is further stated in the opinion that the deed was "in the usual form of a full covenant warranty;" and the court speaks as follows:

> "We think the court below was correct in holding that the deed conveyed an easement only, and not a fee. It does not purport to convey a strip of land forty feet wide, etc., but the right of way over a strip forty feet wide. Cases undoubtedly can be found in which the operative words of the grant relate to the land itself, but such construction cannot be given to this deed. Where the land is first conveyed and then a provision afterwards inserted showing what the land is to be used for it is held in many cases that the fee is conveyed and the clause providing for what the land is to be used is a condition subsequent; but this deed is not open to that construction. It is clear that an easement only was here intended."

Jones vs. Van Bochove, 61 N. W., 343.

No distinction favorable to the decision of this court in the present case, can be made between the words of conveyance in the Michigan deed and the words of conveyance

contained in the act of Congress. If there is any substantial difference the language used in the deed is more strongly indicative of a conveyance of land than is the language in the act of Congress.

That deed conveys, in terms, a right of way "described as" a strip of land 40 feet wide and 952 feet long; while the act of Congress conveys a right of way "to the extent of one hundred feet in width on each side of said railroad."

In Nebraska a deed conveyed to a railroad company, its successors and assigns, for right of way and for operating its railroad only, a strip of land 100 feet wide across certain lands described by government subdivisions, and it was held to convey no title to the land which would enable a successor or assignee of the original grantee to sell and convey a portion of the 100 foot strip to another railroad company for its use, but, on the contrary, that the original deed conveyed only an easement.

Blakely vs. R. R. Co., 64 N. W., 972-3.

There is no substantial difference between this Nebraska deed and the act of Congress under consideration, except that the deed conveys land for certain purposes, while the act conveys a right of way; but it cannot be contended by any one that the right of way granted by Congress was for any other purpose than for the "construction of a railroad and telegraph as proposed."

In Vermont a deed was made conveying "a strip of land four rods in width across my land," and having, at the end of the description, the words "for the use of a plank road," that being apparently the only difference from an ordinary deed of conveyance; and the supreme court of the state held that only an easement was granted and nothing more.

Robinson vs. R. R. Co., 59 Vt. 426.

In Missouri, an act of incorporation of a railroad company authorized the company to "take, hold, use and enjoy the fee simple or other title in and to any real estate." The

company acquired land by condemnation proceedings, over which it built and used a railroad. The owner from whom the land was so acquired, sold and conveyed his land to another, who sued him upon his covenant of seizin, alleging that the company owned the land in fee simple which it had condemned, and which was a part of the land conveyed. The opinion sets out that the statute authorized condemnation proceedings which would result in a judgment in favor of the owner against the company, for the damages assessed, and "an order vesting in the company the fee simple title to the land;" and it appears that such a title had been acquired by such proceedings. The court held, however, that only an easement had been acquired, that the use only had been taken, and that there had been no breach of the covenant of seizin.

Kellogg v. Malin, 50 Mo. 499.

"By the statutes of this state, railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such lands is vested in the company, its successors and assigns. The difference between the perpetual use of land, and the fee to it is only nominal. The interest a railroad company acquires in land in this state for a right of way, while only an easement, may be permanent in its nature, and may be practically exclusive. The value of the remaining fee, burdened by such an easement of perpetual use, is only nominal. (*22 Minn. 286*; *68 N. Y. 591*; *122 Mass. 110.*) The statute seems to recognize this because it requires the commissioners to assess the value of the land taken."

Pilcher vs R. R. Co., 38 Kan. 522.

"The line of railway operated by appellant was constructed more than thirty years since over the lands of G. W. Telford, and has been continually operated. Very recently the railway company has put in a side track over the same land, and within thirty feet of the main track. The executors of Telford, in whom is vested the legal title, bring this action as for an additional appropriation. The company defends upon the ground that this additional track has been put upon their own right of way. No conveyance was ever made by Telford of any right of way, and no condemnation had. The railway company claims a right of way of one hundred feet on each side of the center of the track under the provisions of section 23 of their charter, which is in these words: 'In the absence of any contract with the said company in relation to land through which the said road may pass, signed by the owner thereof, or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of said road, and no longer, unless the person owning said land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them, shall apply for an assessment for the value of said land, as hereinbefore directed, within five years next after that part of said road was finished; and in case the said owners, or those claiming under them, shall not apply for such assessment within five years next after the said part was finished, they shall be forever barred from recovering the said land or having any assessment or compensation therefor, etc.

* * * * *

"We are of opinion that the grant presumed to have been made by Telford was a grant not of the fee, but of an easement. The doctrine of eminent domain rests upon the presumed necessity for the taking of private property for public use. The taking, to be consistent with this theory, must therefore ordinarily be limited to the apparent necessities of the public. Statutes authorizing a taking of private lands for railway purposes generally limit the taking to an easement, leav-

ing the fee in the owner. When the statute does not clearly authorize the condemnation of the fee the easement alone should be condemned. This charter method of condemnation does not expressly condemn the fee and we think the 'grant' presumed and the 'title' acquired is a grant of an easement and the title to the easement and nothing more. *Cooley Con. Lim (5th Ed.). 691; Washington Cemetery Co. vs. Railway Co., 68 N. Y., 594; Lewis Em. Domain. Section 278.*"

Railway Co. vs. Telford, 89 Tenn., 295, 297, 298.

"The interest, or estate, which a railroad corporation acquires in land taken by it for railroad purposes by condemnation is, and from the nature of the uses must be, a right to the occupation of it, exclusive in point of user, and practically unlimited in point of duration. This right, while for many purposes it is substantially equivalent to the fee, is not the fee."

Fitch vs R. R. Co., 59 Conn., 419-20.

One of the reasons given by the court for holding that the "right of way" granted is not an easement, is the applicability of ejectment to the recovery of possession of the "right of way;" but such applicability may be admitted without affecting appellant's position.

The true reason for holding that the interest of a railway company in its right of way is such as to support an action of ejectment, is not to be found in the idea that its estate partakes of the nature of an estate in fee simple, but because, while only an easement in the strict sense of the

word, yet it is such an easement as entitles the company to practically exclusive possession of the land over which it has the right of way, and ejectment is only a possessory action. This is abundantly established by authority, in cases where the courts have been careful to adhere to the proper meaning of the term "right of way," while showing the difference between this kind of easement and others as to the right of possession. A few quotations from authorities will show this beyond question.

"It is objected in the next place, that plaintiff has not sufficient property in the real estate to maintain ejectment; that plaintiff has only an easement, and no title to the soil; and that ejectment will not lie for the recovery of an easement.

"It is true that ejectment will not lie, as a general rule, for an easement, or to be let into the use and occupation of a servitude. The reason is that the party complaining has only a right in common with the public, or with some other person or persons, to the use or occupation claimed. The right is a qualified, limited one, and, in ordinary cases, is not disturbed by another's simple occupation. It is but a privilege to go on the lands of another for a specified, limited purpose and has no element of exclusiveness in it. A right of way, or common, may be given as illustrations of this principle. *Washb. on Easements (3d Ed.), 3, 260-270; Child vs. Chappell, 9 N. Y., 246; Morgan vs. Royle, 65 Maine, 124; Rees vs. Lawless, 12 Amer. Dec. 295.* There are cases which go beyond this doctrine. *Wood vs. Truckee Turnpike Co., 24 Cal., 474; Union Canal Co. vs. Young, 30 Amer. Dec. 212; 2 Wait's Ac. & Def., 247; 2 Redf., R'w'y, 553.*

"Lands claimed and condemned as road bed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired, not the right of use to be enjoyed in common with the public, or with other persons. The right and

use are exclusive, and no one else has any right of way thereon. *M. & O. R. Co. vs. Williams, 53 Ala., 595; M. & M. R'w'y Co. vs. Blakely, 59 Ala., 471; Tanner vs. L. & N. R. R. Co., 60Ala., 621; S. & N. R. R. Co. vs. Pilgreen, 62 Ala., 305; Cook vs. Cen. R. R. & Banking Co., 67 Ala., 533; R. & G. R. R. Co. vs. Davis, 2 Dev. & Bat. (Law), 451; Jackson vs. R. & B. R. R. Co., 25 Vt., 150; T. & B. R. R. Co. vs. Potter, 42 Vt., 265.*

"Ejectment was originally classed as a possessory action. Hence it was that at common law any number of causes could be maintained, by laying the demands at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession, in fact legal as distinct from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterwards found in possession unless the latter can show a paramount title, or a possession continuous, peaceable and adverse, of sufficient duration to toll the entry. *Tyler on Ejectment, 70; Ib. 165; Anderson vs. Mealer, 56 Ala., 621.* The lessee or termor, during the continuance of a valid lease, may maintain the action against the lessor, although the owner of the entire fee less the term. So, the title of a railroad corporation to the possession of the soil covered by the road bed and right of way will, after condemnation, dominate all adverse claim of possession, even by the owner of the fee. "Although the right which a railroad company acquires to land taken under their charter, is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety require that the possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used." *Conn. & Pass. River R. R. Co. vs. Holton, 32 Vt., 43."*

T. & C. R. R. Co. vs. E. A. R. W. Co., 75 Ala., 523-4.

The same case having again come before the supreme court of Alabama, the court took occasion to say:

"Right of way for a railroad is an easement—an interest in the freehold—which can only exist in grant or by prescription."

E. A. R. W. Co. vs. T. & C. R. R. Co., 78 Ala., 281-2.

"We think it clear that the plaintiff, under his grant, has a right of entry upon and possession of the land in question, and that this right of possession is necessarily an exclusive right, as against all certainly besides the United States, and gives the plaintiff such a legal interest in the land as enables it to maintain an action like the present, to recover the possession from one who has wrongfully entered thereon. The obstacles to this suit, such as they are, are entirely technical. If the plaintiff is entitled to actual possession of the land, for the purpose of effecting the object in view when the right of way was granted, it can recover such possession in some judicial proceedings. The mere form of the action has ceased to be of any importance in this court.

"There is now but one form for all the common law actions. In every action the complaint contains a statement of the facts of the case, and is held sufficient, if the facts stated entitle the plaintiff to the relief demanded. We think this complaint does state a good case. It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy. But in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot or other superstructure is placed, and we think the same is true of the whole two hundred feet on each side of the track. The grant is a right of way to the extent of two hundred feet on each side of the track, and the plaintiff is entitled to possess and use the whole quantity."

Central Pac. R. R. Co. vs. Benity, 5 Fed. Cas., 363.

In Vermont it was settled at an early day that railroad

companies took no fee to the land occupied for their purposes, but only an easement—a right of way—although they were, by the statute, to be "seized and possessed of the land."

Quimby vs. R. R. Co., 23 Vt., 393.

And yet it was held that they could maintain trespass, *quare clausum fregit*, against the owner of the fee of the land over which the right of way existed, objection being distinctly made that such action of trespass would not lie for interference with enjoyment of an easement. The court did not attempt to combat the settled doctrine that the railroad had only an easement, but put its decision substantially on the same ground as that now suggested herein —the necessarily practically exclusive possession of the company, which would make applicable to this easement remedies which in earlier times were applicable only to absolute ownership of the land.

The court said:

> "Although the right which a railroad company acquires to land taken under their charter is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety, require that their possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used."

R. R. Co. vs. Holton, 32 Vt., 47.

> "We return, then, to the question: Was this easement capable of transfer? The question seems to be one of first impression. At all events, no case is cited, and we can find none, in which the point has been adjudicated. The subject matter of the question—the right of way for a railroad—is itself new; and the

principles, long ago established in regard to rights of way personal or in gross, and right of way appurtenant to real estate, have no direct application to this new class of rights of way. It, we apprehend, is *sui generis*, and must be governed by reasons peculiar to itself, and the rights which may be derived from the analogies it may bear to the old classes of easements of this kind, whose incidents have been already fixed and determined. It seems to be settled that "if a right of way be in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and is so exclusively personal that the owner of the right cannot take another person in company with him. But when a right of way is appended or annexed to an estate, it may pass by assignment when the land is sold to which it was appurtenant."

R. R. Co. vs. Ruggles, 7 Ohio St., 7-8.

"By the statutes of this state railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such land is vested in the company, its successors and assigns. The difference between the perpetual use of land and the fee to it is only nominal. The interest the railroad company acquires in land in this state for right of way, while only an easement, may be permanent in its nature, and may be practically exclusive. The value of the remaining fee burdened by such an easement of perpetual use is only nominal."

Pilcher vs. R. R. Co., 16 Pac., 948.

Attention is called also to

Williams vs. R. W. Co., 50 Wis., 76.
R. R. Co. vs. McWilliams, 71 Iowa, 164.
Lyon vs. McDonald, 78 Tex., 71.
Lumly vs. R. R. Co., 23 Vt., 387.
R. R. Co. vs. Swivney, 38 Iowa, 182.
Trust Co. vs. R. R. Co., 63 Fed., 613.
Quick vs. Taylor, 113 Ind., 540.
R. W. Co. vs. Geisel, 119 Ind., 77.
Ingalls vs. Byers, 94 Ind., 135-6.

It appears to be quite clear from these authorities that wherever a conveyance of land is limited to any public use such as a railroad, a highway, a toll road, or a public park, the courts will hold that no fee is conveyed but only an easement for the use and benefit of the public. There is nothing to be found in the act of congress which calls for a more expanded meaning for the benefit of a recipient of public bounty which is now seeking to evade its due share of the burdens of taxation.

It is certainly difficult to understand how, in the light of these various decisions it can be asserted that the language of the act of congress does not admit of "reasonable contention" or that there is no "well-founded doubt," which this court has declared will be fatal to any claim of exemption from taxation.

III.

Up to 1866, and for many years thereafter, right of way was never used to mean anything more than an easement.

This is a negative proposition, and the burden of proof is naturally on those who combat it. No such proof has been adduced, and it is here confidently asserted that none can be found. What we are seeking is the intent and meaning of congress, and we must not impute to congress any meaning of its language different from that which prevailed at the time of the enactment under consideration.

Endlich on Statutes, sections 85, 357.

As tending to throw some light on this subject, an examination has been made of early debates in congress in which that section of the Northern Pacific charter which is in the same language as section 2 of the Atlantic & Pacific act—hereinbefore quoted—was under discussion, and some notes of the results are herewith presented.

It is not intended to claim, or supposed, that such things can be allowed to control the meaning of a statute, nor is it forgotten that courts will not ordinarily resort to evidence *aliunde* as to the legislative intent; but it is desired to call the attention of the court to the fact that many times a statute containing this same exemption from taxation was under consideration in both houses of congress, and was the subject of extended debate and careful scrutiny by some of the most eminent lawyers of their day; but none of them discovered any such meaning to this exemption from taxation as is now suggested, although an examination of the debates will make it clear that attention would have been called to it if any such meaning had been dreamed of in

those times. This is but a negative proof, but coupled with the reputation and ability of the men who were critically examining this statute, it may go far toward inducing the court to believe that there may be a "well-founded doubt," and that the language used admits at least of "reasonable contention." What was said by such men—men of eminence, skill, experience and great reputation both as lawyers and as statesmen—may properly be submitted to the court just as opinions of courts or of authors of repute are cited. Attention is particularly called to the remarks of Senator Thurman.

On February 28th, 1870, as will appear by reference to the Congressional Globe, part 2, second session, 41st Congress, at pages 1584-5-6, the senate had under discussion Joint Resolution No. 121, authorizing the Northern Pacific railroad company to mortgage its lands, and providing for indemnity lands in lieu of land which had been located within the limits of its grant, and Senator Pomeroy, after having stated that he was on the committee on public lands in 1864, when the charter was granted and the whole subject canvassed in committee, said:

> "In 1864 it was claimed that congress having passed a Pacific railroad bill in which it granted both lands and bonds, here was an enterprise, the Northern Pacific railway, that could be built upon lands alone. * * * It was distinctly understood and agreed that this road should be constructed, as perhaps no other ever was, and I do not know that one ever can be, upon the stock of the company with a land grant large and certain."

Not a word was said about the valuable exemption from taxation.

At a later day in the same session, March 2, 1870, at pages 1624 to 1627 of the same book, the discussion was resumed. The resolution was strongly opposed as to the clause giving indemnity lands, especially by Senator Casserly, who, at great length, expatiated upon the enormous land grant which had been given, but never hinted at the conferring of an exemption of the railroad and telegraph line from all taxation in the territories. Examination of this debate will convince any reader that if any such valuable immunity as is now claimed for the Atlantic & Pacific company had ever been intended, it would not have escaped the attention of the senators interested who were engaged in making the strongest possible showing of what had been given the company as a reason for giving it no more, and it is to be borne in mind that at that time there were still in the senate many senators who had been there when the Northern Pacific act of 1864 and the Atlantic & Pacific act of 1866, were passed.

This debate was renewed April 7, 1870, and continued at great length as will appear by reference to pages 2480 to 2486 and 2491 to 2495 of the same book, but in the whole discussion no statement is made by any one to indicate that the railroad and telegraph lines were to be free from taxation in the territories of the United States. On the contrary it was in substance declared more than once, that the railroad company received "from the government aid only in the form of lands lying in alternate sections." (P. 2492.)

On the 9th of April, 1870, p. 2539 of the same book, this resolution was again taken up and the discussion continued to page 2547. On page 2539 appear remarks by Senator Harlan, who said, referring to certain railroads in Minnesota:

> "The grant of those roads is but five sections to the mile on each side of the road, being ten to the mile only. Now, if those companies having in hand the construction of their lines of road across the state of Minnesota are able to build them with a subsidy in

> lands of ten sections to the mile, can it be pretended that this company cannot construct that part of their road which lies in the state of Minnesota with just double that amount, which they now have under the existing law?"

If the honorable senator who was making this argument had imagined that the company had any such valuable exemption from taxation as is now contended for, he would certainly have urged the existence of such a grant as additional evidence of the ability of the company to build the road without further concessions.

At page 2546 Senator Howard said:

> "As I said before, this company have never received a dollar in the form of subsidy from the United States. They are to rely upon their own private means and upon the public lands which we gave them to raise the money to carry on this vast enterprise."

At page 2540 Senator Harlan said:

> "But, sir, the applicants for this increased subsidy do not understand these lands to be worthless. They are doubtless men of intelligence. They have read what has been written and published with reference to the topography of this part of our country. They know that on account of the reasons to which I have referred, as well as on account of the great depression in the mountain ranges west of the lakes, giving free access to the humid atmosphere from the Pacific ocean, this whole line of country is a fruitful country; that it produces grass and timber up to the very foot of the Rocky mountains, and through all of the valleys of the various mountain ranges, until you approach within a few hundred miles of the Pacific coast where the whole country is densely covered with immense forests. It is not a desert, therefore. If any one will take the trouble to read the report of Governor Stevens of his exploration of this proposed line of road, he will ascertain that from actual observation and personal inspection it is found to be a fertile country. This being so, it becomes manifest, as it seems to me, that the quantity of land already granted is sufficient inducement to enable the company, if they can be induced by a grant of land, to build this road."

On the 11th of April, 1870, the debate on this resolution was again renewed, beginning at page 2569 of the same book and running to page 2584. In this day's debate Senator Thurman, violently opposed to the resolution, made an extended argument against it and attempted at the beginning of his remarks to enumerate the benefits given to the company by the original act, as to which he spoke as follows:

"Now, Mr. President, let us look at what this company is, and what has already been done for it. It was chartered on the second of July, 1864, nearly six years ago. By its charter there was granted to it throughout the greater part of its route, throughout the territories of the United States, every alternate section in a breadth of eighty miles, being forty alternate sections to the mile. These forty alternate sections to the mile make twenty-five thousand, six hundred acres, to the mile; and these twenty-five thousand, six hundred acres, at the government price of $1.25 an acre, will come to a subsidy of $32,000 per mile.

"But this is not all. In addition to this subsidy, equal to to $32,000 per mile at the government price of land, there is given to this road the right of way, and no ordinary right of way of fifty or seventy-five feet in width, but a right of way four hundred feet in width, throughout the entire length of the line and the length of its branches. In addition to this right of way there is given to it absolutely all the land it may need for work shops, depots, water stations, or any of the other structures necessary to the road, although they may be outside of the right of way of four hundred feet.

"Again, sir, the right is given to this company to take from the lands of the United States, wherever situate, all the materials it may need for the construction of the road, whether they be wood or stone, or iron, or gravel, or what not. The right to take all material it may need or can find anywhere upon the public lands is given to this company absolutely as a free gift.

"That is not all. Of the alternate sections that are given to it there are no exceptions on account of either coal or iron. While mineral sections are excluded from the grant in terms, it is also provided that the term

> "mineral section" shall not apply to sections containing iron ore or coal; so that the most valuable iron ores near Lake Superior, the most valuable iron ores that may be found on the route in the western part of the line, may all belong to this company, as well as the most valuable coal mines."

By comparing his language with the section containing the exemption from taxation, it is evident that the senator had that section under his eye while speaking, and yet, in the enumeration of the benefits conferred, he considered the exemption so insignificant as not to be worthy of mention. It cannot be believed for a moment that, if the construction now given to this exemption had ever been dreamed of in 1870—if such a meaning as is now imputed to the language of Congress had ever been heard of by any one in or out of the legal profession—the trained eye of such a lawyer as Mr. Thurman would have overlooked it at a time when he was exerting all of his great powers in an exhaustive argument where he sought to show to the fullest extent the enormous donations and benefits which Congress had conferred upon the company. In scanning the language of this section, he did not consider this exemption of any consequence whatever; and yet for the purposes of his argument on that occasion, an exemption from taxation of the whole of the railroad and telegraph line through the territories of the United States—and at that time almost all of the Northern Pacific railroad was projected to run through the territories, nearly two thousand miles—would have been of immense importance and would have greatly strengthened his statement of the grants made to the company. Moreover, he recurs to this subject of the right of way two or three times in his speech, but fails to discover this wonderful exemption. The conclusion is irresistible that up to 1870 no one had ever heard of the greatly expanded meaning of the term "right of way" which makes it synonymous with the land itself over which the right is to be exercised. If such a meaning was at that time un-

known, it certainly does violence to every applicable rule of statutory construction, now to say that Congress intended something which no one had ever heard of at the time the act was passed.

The discussion of this resolution was resumed in the senate on April 20, 1870, as appears in part 4 of the Congressional Globe at pages 2833 to 2844 and pages 2867 to 2869, when the resolution was finally passed. Then the resolution went to the house, where it was up for discussion on four different days as will appear by reference to pages 3263 to 3271, 3343 to 3348, 3365 to 3368 and 3786 to 3798. It is true that on two of these days the proceedings were almost entirely of a filibustering character for the purpose of compelling opportunity for debate and the offering of amendments, and in this the minority was successful; but no one in the house any more than in the senate, discovered anything remarkable in the exemption from taxation.

The speech of Mr. Casserly on this resolution, made in the senate on the 20th of April, 1870, is printed in the Appendix to the Congressional Globe for the second session of the 41st Congress, beginning at page 303, and near the beginning he says:

> "Senators are now well informed as to the nature of the work to be undertaken by the Northern Pacific railroad company. Senators know—they cannot pretend any ignorance—that for the length of it, it is the easiest road to build in the whole world of railroads. Compared with any other great railway, there is upon its line less heavy work, there are fewer broad rivers to be bridged, fewer high summits to be overcome, fewer wide valleys or deep chasms to be spanned or filled. Beyond this, and much more than this, its route lies through a finer and more fertile country, taken altogether, than is traversed by any other railroad line of anything like the same length in the United States or on the globe. All this is well understood. No one pretends to doubt it. In all this debate no question has been made of it by any friend of this measure."

In his elaborate speech, covering almost seven and a half pages of the Globe, the learned senator fails to discover, in

his attack upon the system of great gratuities conferred upon railroad companies, this vicious exemption from taxation, an exemption so broad, so evil, so far-reaching, that had it really existed in the statute, such a man as this senator would certainly have discovered it.

In a speech of Mr. Stiles, of Pennsylvania, made on the 25th of May, 1870, which is printed at page 609 of the appendix, the speaker, much like Senator Thurman, carefully enumerates the grants made to the Northern Pacific railroad company, dwelling especially upon the things set out in the second section of the act, and particularly emphasizing the great value of the gift of free right of way, but he fails to discover in that section this remarkable exemption from taxation, although he was evidently looking for everything which had been given to the company.

At page 391 of the same appendix will be found an extract from the report of the directors of the Northern Pacific company setting forth the valuable possessions of the company which would easily enable it to build the railroad, but they fail to mention this important item of exemption from taxation, because at that time no one had ever thought of such a thing.

In the 39th Congress an effort was made to get the government to guaranty the interest at six per cent upon the stock of the Northern Pacific railroad company and the measure was discussed in the house of representatives on the 24th, 25th, 26th and 27th of April, 1866, as will be seen by reference to the Congressional Globe at pages 2159 to 2161, 2182 to 2191, 2203 to 2215 and 2235 to 2246, when the bill was finally defeated by a vote of 76 to 56.

In the course of this debate, page 2208, Mr. Donnelly, of Minnesota, said:

> "Now we have had presented here by the opponents of this bill, quotation after quotation from pamphlets and from speeches to show that the land grant already made to the company is of such enormous value that it alone ought to enable the company to build the road; that in any event it is of such great value that when the road shall have been constructed the land adjacent to it and already granted to the company will be equal in value to the total cost of the road itself."

And, a little later, he quotes from a letter of the Honorable John Wilson, third auditor of the treasury department, as follows:

> "I have not the figures nor would I now be able to work them up if I had, but comparing this with the Illinois Central railroad grant, I think it a small estimate to say that if this grant is properly managed, it will build the entire road, connecting with the present terminus of the Grand Trunk, through to Puget Sound and head of navigation on the Columbia; fit out an entire fleet for the China, East India and coasting trade, of sailing vessels and steamers, and leave a surplus that will roll up to millions."

This had already been quoted by other gentlemen. Everybody agreed as to the enormous value of the land grant.

At page 2213, Mr. Washburne, of Illinois, inveighs with great earnestness against the third section of the proposed bill which would have exempted the lands granted to the railroad company from all taxation until after two years from the date of their conveyance by the company, and pointed out the monstrous injustice to the people of the territories, who, as he declared, "should have the right to tax all the lands to support their government, maintain their schools, build their public buildings, roads, etc." Manifestly, with all his opposition to this company and to the great grants which had been made to it, he had never discovered the exemption from taxation now contended for,

had never dreamed of such a construction, or he would have proclaimed it with all the great vigor which he possessed.

At the same session of Congress, in the senate, a bill was introduced which appears to have been the same, or substantially the same, as the one which had been defeated in the house. Debate on this bill began July 14, 1866, page 3807 of Congressional Globe. The committee reported various amendments, one of which was an exemption from taxation of the lands of the company for five years after the issuing of patents for the same, the bill having previously provided for exemption from taxation until the lands should be sold and conveyed by the company. Mr. Sherman violently opposed this bill. The discussion was resumed July 16, 1866, pages 3830 to 3838. On pages 3831-2, Mr. Sherman clearly sets out the two railroad propositions of the Union and Northern Pacific, sharply defined, as they were before Congress in 1864, and plainly shows that no such considerations existed at that time as have been urged on behalf of appellants in the present case. While expressing his strong conviction that the road could be built upon the land grant alone, he never refers to the exemption from taxation of the right of way as one of the inducements to investors. This bill was also opposed by Senator Fessenden at great length. Its discussion was resumed July 17, 1866, at page 3866 of part 5, Congressional Globe, First Session, 39th Congress, and on motion of Mr. Sherman, page 3867, referred to the committee on the Pacific railroads, which had the effect of carrying it over the session. The bill was reported by the committee, July 24, 1866, page 4064, with amendments materially reducing the aid proposed to be given to the company, and was then post-

poned until the next session of Congress. It does not appear, however, to have been revived or called up at the next session.

Upon the discussion of a joint resolution extending the time for the building of the Northern Pacific railroad, in the senate, May 30, 1868, at page 2689 of part three of the Congressional Globe, Second Session, Fortieth Congress, it is stated several times in substance that the only aid the railroad company had been granted was the land grant.

In a memorial of the Northern Pacific railroad company, printed as H. R. Misc. Doc. No. 272, Forty-third Cong. First Session, at page 2, it is declared that "The only aid given to the road by the government was land."

The most cursory examination of these lengthy debates in Congress cannot fail to convince the reader that such meaning of "right of way" as would make that phrase synonymous with the land itself, or such a construction of the statute as would extend the exemption of the "right of way" from taxation, to an exemption of the whole railroad and telegraph line, had never been contemplated by any

one. No one discovered it; no one mentioned it; no one ever hinted at it; although the close, eager, zealous, critical attention of many of the keenest minds and best trained intellects our country has ever produced, was, for long periods of time, fixed, not only upon a statute containing this provision, but even on the very section which declares the exemption.

IV.

The common law rule that whatever is affixed to the soil becomes a part thereof, cannot properly be applied to the present case.

If it be admitted, *arguendo*, that the court is correct in its first position, that Congress granted either an estate in fee simple in the two hundred foot strip, the use of which for a right of way it gave through the public domain, or at least more than an ordinary easement and something of a corporeal nature, appellant still insists that the common law rule, that things affixed to the soil become a part thereof, can have no proper application to this case. This proposition was not discussed by counsel for appellant either on the oral argument or in his printed briefs, and it is now clear that this was a mistake on his part. It can only be said in excuse that he was so misled in his views of the case as to attach but little importance to this question which the opinion of the court has shown to be really decisive of the case. A rehearing might well be granted upon the ground alone that such a vital question had not heretofore been argued.

A.

As to this point this is a case of the first impression in this Court.

It should be understood at the outset that so far as the application of this rule of the common law is concerned, the present case is the first of its kind in this court, that it is entirely new in this ~~form~~ *forum*, that there is nothing in the earlier decisions of this court on this point which will serve as a guide in the peculiar circumstances of this case. Therefore, if there is any doubt, certainly the benefit thereof must be given to the taxing power. The question has arisen in but two jurisdictions heretofore, once in Montana and twice in Arizona, with directly opposite results.

N. P. Co., vs. Carland, 5 Mont., 146.

A. & P. Co., vs. Lesueur, 19 Pac., 157.
A. & P. Co., vs. Yavapai, 21 Pac., 768.

It is not meant that this court has never been called upon to consider whether rails, ties and bridges do not become a part of a railroad to which they are affixed, or would not pass under a mortgage or conveyance of the railroad; but that it has never been called upon to consider whether such things become a part of the soil to which they are affixed in a controversy between a sovereign power attempting to exercise its authority to tax, and a railroad company seeking to evade taxation.

The full extent to which this court has gone in the application of the common law rule is clearly set forth as follows:

> "Whatever is the Rule applicable to locomotives and cars and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."
>
> *Porter vs. Steel Company, 122 U. S., 283.*

It is obvious that such a decision is based principally upon a consideration of the relations between the parties,

upon their relative positions toward each other, and is not intended to lay down a hard and fast rule applicable to all cases in which the question of rails and other articles affixed to the soil may arise. The most frequent occasion for making exceptions, arises from the differing relations between the parties. To this we will hereinafter recur.

B.

The general condition of the law of fixtures is such that the court should not apply the common law rule to this case.

In the present case the court applies the common law rule that whatever is affixed to the soil belongs to the soil, with all its ancient rigor and strictness. Now before proceeding to the consideration of how far that rule has been relaxed in modern times, attention should be called to the fact which might well be controlling, that when that rule came into existence, and during the greater portion of the time that it has continued, no such things as railroads were known. Nothing even analogous to these public instrumentalities for trade, commerce and transportation, devoted to the use of the public, had been dreamed of. If the application to new conditions of such an artificial rule leads to manifest injustice or absurdity, then the courts will hold it inapplicable. If this is not so, then the claim that the law is a progressive science, adapting itself to new conditions and to the numerous complications ofmodern life, must be abandoned.

Of course it is the intention of Congress which is to govern, and that intention is to be deduced primarily from the language of the statute. The court has taken the view that, from that language alone, we must draw the conclusion that Congress intended, *first*, to grant a corporeal estate in land by the grant of a right of way, *eo nomine; second*, by the grant of an exemption of the right of way from taxation, to extend such exemption to every thing which might be affixed to the land through and over which the right of way is granted, having in mind the rule of the

common law above referred to. Let us first briefly consider the general condition of the law on this subject.

The most fruitful source of the numerous modifications and exceptions to the common law rule as to fixtures, is to be found in the different relations which parties bear to each other. That which is a fixture and a part of the realty as between vendor and vendee, mortgagor and mortgagee, or between heir and executor, would not be a part of the realty under precisely like circumstances of annexation as between landlord and tenant or if it were affixed to the soil for purposes of trade or manufacture and not for the better use of the land as land. Why should not the rule be as liberal in favor of the taxing power of government, struggling for the means of existence, as in favor of a tenant against his landlord?

It has been said, and with undoubted truth, that the law of fixtures is confessedly the most uncertain title in the entire body of American jurisprudence, and that a judge might in any given case decide either way without much danger of having his judgment impeached or of failing to find some authority to support it.

Tyler on Fixtures, 34.

If that is so, may there not be a "well-founded doubt" in the present case?

As was well said by a former reporter of this court in a note to the case of *Minnesota Co. vs. St. Paul Co.*, 2 *Wall.*, "a fixture is one thing between landlord and tenant; a different thing between vendor and vendee; one thing in the economy of trade, another for the purposes of agriculture."

A few quotations will better illustrate the condition of the law to which attention is invited.

> "The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes a part of it, and cannot afterwards be removed except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as it can

be traced in the books, inflexible, and without exception. It was construed more strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. But even exceptions of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade, upon principles of public policy. And to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes."

Tyler on Fixtures, 54-5.

"It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures, and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness; and that is, that no general rule, applicable to all cases, and to all relations of the parties, can be extracted from the authorities.

"There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee. And this distinction is observed in the case between mortgagor and mortgagee, and again modified as between the heir and the executor.

"The fact of actual and permanent annexation of the thing, personal in its nature, to the freehold, was formerly regarded as essential. But this has been found to be unsatisfactory and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test."

"The doctrine of fixtures by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions, made at different periods of time and under a variety of circumstances, and running into numerous complications and conflicting distinctions arising out of the peculiar relation of the parties and the peculiar circumstances of each particular case; so that it has been found extremely difficult to reduce this branch of the law to any consistent and uniform system.

"According to the decisions, an article may be a fixture constituting a part of the realty as between vendor and vendee, which would not, under like circumstances, be such, as between landlord and tenant; so also an article may be such fixture as between heir and executor, which under like circumstances of annexation, would not be such as between tenant for life and the remainderman or reversioner. And also according to the decisions, an article affixed to the premises for purposes merely agricultural may pass by conveyance of the freehold as a fixture, which would not be such fixture under like annexation if erected or affix for purposes of trade or manufacture; and an article attached to the realty may be removable at one period of time as a chattel, which with the same annexation at another period would not be removable because it constituted a part of the realty. In some cases it has been determined, that in order to constitute a fixture the article should be so united by physical annexation to the land or to some substance previously belonging thereto, that it cannot be detached without injury to the property; while in other cases, articles have been determined to be fixtures, and as such to pass by a conveyance of the freehold with but a slight attachment to the realty and in some instances with-

out any actual but by simply a constructive attachment."

Teaff vs. Hewitt, 1 Ohio St., 523-4.

"In the great case of *Elwes vs. Maw, 3 East, 38, 2 Smith, Lead. Cas., 228*, Lord Ellenborough considers the doctrine of fixtures as depending largely in its application upon the relations of the parties,which he divided into three classes: 1. Executor and heir. As between these the common law rule that whatever is affixed to the freehold, becomes a part of it, and passes with it, *quicquid plantatur solo, solo cedit*, is observed in full vigor. In this class fall also mortgagor and mortgagee, vendor and vendee, as to whom the strict rule of the common law is still in force. *Foote vs. Gooch, 96 N. C., 265.* (2) Between executor of tenant for life or in tail, and the remainderman; in which case the right to fixtures is considered more favorable for the executor. (3) Between landlord and tenant: in which case, in favor of trade and to encourage industry, the greatest latitude is allowed, so that all fixtures set up for better enjoyment of trade are retained by the tenant, though this does not include fixtures used for agricultural purposes. Where, however, they are used for mixed purposes of trade and agriculture, they are held to belong to the tenant. *Williams Pers. Prop. 16, note*, and numerous cases cited. The reason of the distinction is pointed out by Pearson, Ch. J., very succinctly in *Moore vs. Valentine, 77 N. C., 188*. When additions are made to the land by the owner, whether vendor, mortgagor or ancestor, the purpose is to enhance the value and to be permanent. With the tenant, the additions are made for a temporary purpose, and not with a view of making them part of the land; hence, for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what had apparently become affixed to the free

hold, if affixed for purposes of trade, and not merely for better enjoyment of the premises."

Overman vs. Sasser, 10 L. R. A., 724.

A case in New Jersey well illustrates the confusion and uncertainty on the general subject of the law of fixtures, Vice-Chancellor Bird, in what appears to be a satisfactory and well-reasoned opinion, holding one way, and the Court of Errors and Appeals, in an equally good opinion, holding the exact opposite.

Ins. Co. vs. Semple, 38 N. J. Eq., 575-6, 583-6.

Certainly as early as the time of Henry VII, the courts began to recognize exceptions to the law respecting annexations to the freehold, a law based on the early idea of the sacred and superior nature of property in land, and from that time forward the courts steadily introduced exceptions so numerous and so extensive as almost to have subverted the rule and these innovations have been sanctioned by courts only upon enlarged principles of public policy.

Tyler on Fixtures, 45-6.

If by a species of judicial legislation the courts of England and America have steadily advanced in the direction

of the relaxation of the ancient rule upon various considerations of public policy, certainly in a case involving the right of taxation, so "essential to the existence of government" as this court has declared it to be, a court ought not to hold that "the deliberate purpose of the state clearly appears" to relinquish that power, when it can do so only by invoking this ancient common law rule which authorities declare to have been almost entirel subverted, especially in a case where the question is one of first impression. As earlier decisions of this court show, the claim of exemption from taxation is so against public policy, that it will never be allowed if there is any way to avoid it.

In view of this condition of the law and in view of the newness of this case, it is difficult to declare that there is no "well-founded doubt" as to the propriety of applying this rule to such a controversy as the present one.

C.

In the courts of many states, the common law rule has been held inapplicable to this particular class of fixtures.

Controversies with regard to whether fixtures become a part of the realty or not, have almost always arisen in cases where it was claimed that a person had expended money or labor upon the property of another knowing that he was doing wrong, in which cases it has been held that he must lose what has been so expended. No such controversy arises in the present case. But, as will be shown, there are many cases where railroad companies wrongfully entering upon the lands of others, have constructed railroads, and the courts have refused to apply the rule so as to make the companies lose what they had expended. If this rule can properly be relaxed for the benefit of wrong-doing, trespassing railroad companies, it is difficult to discover any good reason for its rigid application against the sovereign taxing power and in favor of a corporation seeking to evade its due share of the burden of maintaining the government.

In view of these numerous decisions, made generally in favor of railroad companies, and excepting this class of fixtures from the operation of the common law rule under circumstances which at the common law would certainly have made it applicable, unless this court will declare all of the reasoning in these cases to be unsound and the conclusions reached to be wrong, it cannot logically be said that there is no "well founded doubt" as to the propriety of applying the rule in all its strictness for the benefit of a corporation possessed of an immense amount of property, enjoying the protection of the laws of the country and refusing to bear what would be its natural and just proportion of the burdens of government.

In at least thirteen states, the courts of last resort have refused to apply this rule of the common law to such fixtures as rails, ties, bridges, etc., of railroads. Attention will be called to a portion of these cases.

"The general rule of the common law certainly is, that whatever is affixed and annexed to the soil becomes a part of it and cannot be removed except by him who is entitled to the inheritance. But this rule is by no means inflexible and without exception. Trade fixtures have been held by the earliest cases in which the question arose, to form an exception. No matter how strongly attached to the soil or firmly imbedded in it, they are treated as personal property, and as such subject to removal by the person erecting them. In the leading case of *Elwes vs. Mawe, 3 East, 38*, the earlier and more important decisions upon this subject are very fully reviewed by Lord Ellenborough, and his conclusion from them, that trade fixtures and buildings for trade have always been recognized as an allowed exception to the general rule, has been acquiesced in, without an exception, as correctly stating the law. The distinction which he

makes against fixtures for agricultural purposes has been doubted, and regarded as too nice and technical, but there is no case in which the exception has not been held to apply to trade fixtures. In *Van Ness vs. Pacard, 2 Peters, 37*, the exception is recognized by the supreme court of the United States, Story, J., delivering the opinion, and the doctrine applied to a house, which had been erected as necessary to the business of a dairyman, although it was occupied as the residence of his family and those employed by him. It is also recognized and asserted in *Holmes vs. Tremper*, 20 Johns. 29; *White's Appeal*, 10 Barr, 252, and others there cited.

"Another exception to the general rule is that of structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use, as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder; and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty or is to be treated as personal property. * * *

"We consider the property in dispute in this case as coming within both of these exceptions. The railway of which it formed an important and necessary part, cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary trade and pursuits of a railway company. It certainly was not necessary to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned it is not pretended that it would or could have been used by the appellee as a railway. The conclusion cannot be avoided that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. The railway is certainlyquite as essential to the trade and business of a railway company as a steam engine and the house which may cover it, or any other fixture can be to the miller or the miner. We do not mean to be understood as denying the doctrine laid down in *Farmers' Loan and Trust Co. vs. Hendrickson*, 25 Barbour, 484, and cited with approv-

al in *18 Md., 193*, that the road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property. *Prima facie*, a house with its foundation planted in the soil is real property, yet when it is accessory to trade and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question. As a general rule, it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules of law that govern any other personal property.

"All the surrounding circumstances show that at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant with its money and labor, in the reasonable belief that it had a free right of way, and under the license and by the permission of the owner of the soil. It is true that this license was not of such a character as made it irrevocable, or gave the appellant any sufficient standing in a court of equity, to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it, before its revocation, is to be regarded as legal, and not as the act of a trespasser. The road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management and taken up and replaced such rails or other materials as were necessary in its judgment for the repairs and proper condition of the road.

Northern Central R. W. Co. vs. Canton Co. 30 Md. 352-3-4-5.

In an interesting Texas case, the railroad company had entered wrongfully on the land of another, constructed its

railroad which it used continuously for eight years, when one Hays, who had purchased the land, brought suit, in accordance with the Texas practice, in the form of trespass to try title. In this action judgment was rendered against him and he appealed; the supreme court of the state reversed the judment, rendered judgment against the company and awarded a writ of possession.

Hays vs. R. R., 62 Tex., 397.

Thereupon the railroad company instituted condemnation proceedings in which commissioners, appointed for that purpose, assessed the damages at $8,350, of which the sum of $8,250 was the value of the railway track and $100 the value of thirty-three acres of land taken as a right of way. Hays insisted that the first action had adjudicated his right to the land, including the improvements, and the judge of the county court held with him and that he was entitled to the value of all the improvements. The case was then taken to the court of appeals which said:

> "Section 57. We will first notice the plea of *res judicata*. Touching directly upon this subject, the doctrine announced, and the full extent to which it was announced by the supreme court in said case of *Hays vs. R. R. Co.*, 62 Texas, 397, is that "a party in possession of another's land claiming an easement is a trespasser if his claim is without foundation. If, in a suit by the owner of the soil the plaintiff shows title to the land and the defendant to the easement, the plaintiff recovers subject to the right of defendant to enjoy the easement. If the defendant shows no title of this character, the owner of the land dispossesses him altogether." Now, whilst we admit that this rule gave to appellant, owner of the land, the title to the easement or right of way which the appellant was using, appellant being a trespasser, we do not understand that the fixtures, that is, the superstructure placed by appellant upon the land, although placed there without authority, became a part of the land, and that appellant should be dispossessed thereof by said judgment. That was not the question involved in the decision of the case as presented to and determined by

the supreme court and the plea of *res judicata* was not sustained by the evidence.

"Sec. 58. The general rule is that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions; as, for instance, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate. Mr. Pierce in his standard work on railroads, discussing improvements made by a railroad company during an illegal possession of land, says: 'The laying of the rails or similar structures differs essentially from the ordinary transaction of placing fixtures on real estate, and is not governed by the same rules.' *(Pierce on Railroads, 219.)* It certainly is by law made the duty of a railroad company seeking to take and appropriate the lands of the owner to its own use to ascertain, in the manner provided by law, the compensation to which such owner is entitled and to make paymnet thereof before occupying the premises. Failing to do this, the company is a trespasser, but though such is the status of the company in the eye of the law, yet as was said by Chief Justice Brickell in *Jones vs. R. R. Co.*, 70 Ala., 227, "The neglect of the duty, the wrongful entry and possession, does not preclude the company from resorting subsequently to the proper proceeding for the acquisition of the land and of consequence availing itself of all the structures it may have placed thereon. (Justice vs. R. R. Co. 87 Pa. St., 28.; Secombe vs. R. R. Co., 23 Wall. 108.)"

R. W. Co. vs. Hays, 3 Tex. Ct. of App., C. C., Sec. 57-8.

"The railroad company was a trespasser in constructing its road upon land over which it had not acquired the right of way, but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass. The trespass committed is not involved in the determination of the due compensation. The contiuing right of the company to secure

the right of way, in accordance with its charter, and the nature of its entry on the land annexing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold, and the rule of the common law, established when railroads were unknown, is not applicable."

R. R. Co. vs. Dickson, 63 Miss., 385.

"The appellee having entered upon lands without the consent of the owner, without instituting the necessary proceedings for the ascertainment of the compensation to which the owner was entitled and its actual payment in money as required by the constitution, was a trespasser. The owner could have supported an action of trespass against it or an action of ejectment, and could have enjoined it by bill in equity from the construction of its road, until the compensation was ascertained and paid. *Pierce on Railroads, 166-7; N. O. & Selma R. R. Co.*, and *Imm. Asso. vs. Jones*, at last term.

It is, as insisted by the counsel for the appellant, a maxim of the common law, that everything affixed to lands became a part of the freehold, subject to all its incidents and properties, and cannot be dissevered, or converted into personal property, without the act or consent of the proprietor of the lands. The maxim was never inflexible in its operation, and as far back as it may be traced, was subject to exceptions. *Van Ness vs. Pacard*, 2 Peters, 137; *N. C. R. R. Co. vs. Canton*, 30 Md. 347. These exceptions have multiplied with the increase in importance and value of personal property, and the varied necessities and exigencies of society. It is, nevertheless, true, generally, that if there is a tortious entry upon lands, and the tort-feasor makes improvements upon them, annexed to the soil for the better use and enjoyment of the lands, such improvements become a part of the realty. All property in them is vested in the proprietor of the soil, who is under no legal or equitable obligation to make compensation for them, or to suffer them to be dissevered and removed. *2 Kent*, 338. It was the fraud or folly of the tort-feasor to build, to plant, or to sow, on the lands of another, without his consent. *Amos & Ferard on Fixtures, 10.*

This maxim seems to us incapable of any just application to parties standing in the relation of these parties, or to a proceeding of this character; and it

must not be overlooked, that they have corresponding rights and remedies. In this relation, they are placed by law. The rights of each party, the law distinctly defines; and the remedies each must pursue to secure and enforce their rights, are clearly prescribed. It was the right of the appellee to acquire the lands for the use of the road; a public, not a private use. Appropriate proceedings for its acquisition, if from any cause it could not be acquired by contract with the owner, the law prescribes. Just compensation for the land at the time of its taking, paid before or concurrently with its appropriation, was the right of the appellant. If there was an entry upon and appropriation of the lands without the consent of the owner, and without having the compensation ascertained and making payment of it, there were remedies to which he could have resorted, protecting himself, regaining his possession, and compelling the ascertainment and payment of the compensation. If he is negligent, if he stands by in silence, suffering the wrongful entry or continuance of possession under it, the construction of costly improvements, not necessary to the enjoyment of the freehold, inconvenient to his use and occupation, valuable to him only because he may dissever them, converting them again into personal property, and valuable only to the party making them for the uses to which they are dedicated, there is but little of equity in a claim that the measure of his compensation shall be increased by the value of the improvements, or that the time at which such compensation is to be estimated shall be varied. *Nemo debet locupletari ex alterius incomodo* is a maxim of the common law of as much force, though it may not be of as general application, as the maxim *quicquid plantatur solo, solo cedit.*

The duty rested upon the appellee before the taking and appropriation of the lands to have caused in the appointed mode the ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty the entry upon and possession of the lands was wrongful, no title to them was acquired and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellee from resorting subsequently to the proper proceeding for the acquisition of the lands, and of consequence availing itself of all the structures

it may have placed thereon. *Justice vs. N. Y. R. R. Co., 87 Penn. St., 28. Secombe vs. R. R. Co.*, 23 Wall., 108. Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and bywhich title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and, keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment of, or title to, the lands. There is also another distinguishing fact; the structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses which are the consideration for the grant to the appellee of corporate franchises and of the right, in the exercise of these franchises, to take and appropriate private property. *Justice vs. N .V. R. R. Co., Supra.; N. C. R. Co. vs. Canton, Supra; Morgan vs. N. V. Co.*, 39 Mich., 575; *Lyons vs. J. V. & M. R. R. Co.*, 42 Wis. 538. These elements of the case distinguish it from that of the trespasser entering upon lands, affixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty and which following the title to the soil, as one of its incidents, pass to the proprietor."

Jones vs. R. R. Co., 70 Ala., 230-1-2.

In Ohio the owner of lands in 1854 granted to a railroad company and its assigns, "the right of use of a strip of land, not exceeding one hundred feet wide, on and over the lot described below for a railroad;" and the writing evidencing this grant contained a further provision which indicated that the railroad company should have exclusive possession of the said one hundred feet. It will be seen

that by this grant the railroad company was to have exclusive and perpetual use and possession of the strip of land quite as much as the Atlantic & Pacific railroad under the grant by Congress. The only contemplated termination in either case would be the abandonment of the railroad or the termination of the life of the company. The Ohio company constructed its road and built a bridge across the Maumee river, putting on the said land eleven piers and abutments of stone masonry, and in the spring of 1855 the building of the railroad was abandoned, the stone in the piers and abutments being left on the premises. In 1867 the railroad company sued the owner of the land because he had prevented the removal of the stone in the piers and abutments, and it was contended on his behalf that these structures were fixtures and upon the abandonment of the railroad by the company remained a part of the realty and became the property of the owner of the land. The court held that the structures did not become a part of the realty, but belonged to the railroad company and could be removed without the consent of the owner of the land, putting this decision upon the ground that these structures were destined for use in connection with the railroad in its transportation of persons and property and not for the purpose of improving the realty. The following quotation from the opinion will indicate the reasoning of the court:

> "The use of the strip of land on which the piers were built was granted to the railroad company for the purpose of constructing part of a continuous line of railroad which it was authorized to build and operate. The piers were as much a part of the road as the bridges they were designed to support, or the rails and ties on the road. The use the road was intended to subserve and to which alone it was adapted, was the transportation of persons and property. The road and all its parts were merely accessory to this business, and were put on the land for this purpose, and not as accessories to the land over which the road was to pass. The part of the road built on the premises of the plaintiff in

error, disconnected from the other parts of the road, could not be operated, and would be useless as a railroad. Nor could it serve any useful purpose as an appurtenance to the land on which it was built."

Wagner vs. R. R. Co., 22 Ohio St., 577-8.

"The argument on behalf of the defendant on the first point is, that the plaintiffs, in constructing the railroad track, were trespassers, and that the track, being attached to the soil, became a part of the realty, and belonged to the owner of the land. Hence he claimed that its value ought to be included in the estimate of damages, in like manner as though the defendant had himself built the road. But this proposition cannot be maintained. Neither the constitution nor the statute contemplates that a person, whose land is taken in the exercise of the right of eminent domain, shall be entitled to anything beyond a 'just compensation.' He is to be paid the damage he actually suffers and nothing more. But, to hold that, in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over technical construction of it."

R. R. Co. vs. Armstrong, 46 Cal., 90-1.

In a Minnesota case, where a railroad company had wrongfully constructed its road over land of another, in subsequent condemnation proceedings the court held, on

broad grounds of equity, that the owner was not entitled to compensation for rails, ties, etc., but a concurring judge, dissenting from that line of reasoning, and referred to *Justice vs. R. Co., 87 Pa. St., 28*, as furnishing reasons "much more sound and satisfactory."

Greve vs. R. R. Co., 26 Minn., 68-71.

In a case in Mississippi, brought by the holder of a tax deed for the fractional thirty-eight acres in the S. E. ¼ of N. W. ¼, etc., against a railroad company which had wrongfully laid its track over a portion of the land, the court held that while the land covered by the right of way belonged to the holder of the tax title, yet the superstructure placed thereon by the railroad company did not go with the land upon which it was laid.

I. C. R. Co. vs. Le Blanc, 21 So., 761.

In the following cases, also, the courts have refused to consider such railroad improvements as becoming parts of the realty.

Morgan's Appeal, 38Mich., 679.
Ry. Co. vs. Dunlop, 47 Mich., 465.
Lyon vs. Ry. Co., 42 Wis., 544-5.
Daniel vs. R. R. Co. 41 Iowa, 53.
R. R. Co. vs. Morgan, 42 Kan., 23.

"The theory upon which the court below proceeded was, that the plaintiff, having entered upon the land without the consent of the owner, and without having instituted the necessary proceedings required by statute for the ascertainment of damages or compensation to which the defendant was entitled, and the payment of the same, was a trespasser; and that the rails, ties and other structures which the plaintiff had affixed to the lands in the mode ordinarily done for railroad purposes, became a part of the freehold and vested in

the proprietor of the soil. It is evident from the language of the instructions, that the court applied the common law maxim *quicquid plantatur solo, solo cedit,* with ancient rigor and strictness, and regarded the fact of attachment to the soil of structures as decisive of their character as fixtures, and the right of the owner of the land to them.

"The old rule, that all things annexed to the realty become a part of it, has been much relaxed, and several exceptions recognized; as where the intention is manifest to use the alleged fixtures in some employment distinct from the use of the soil or husbandry, or where the chattel has been affixed for the purposes of thade or the mechanical arts. In modern times, for the encouragement of trade, manufactories and transportation, and owing, no doubt, in part to the increased value and importance of personal property, many things are now considered as personalty which are attached to the soil. The necessities and convenience of an advancing civilization have demanded a relaxation of the strict rule, so that now attachment to the soil is only one of several conditions to help in determining whether a given thing belongs to the realty. The books indicate that various considerations have been applied by the courts in the determination of this question; and that few decisions, although involving fixtures of a similar character, can be considered of absolute authority for its disposition; but in the nature of things every case must depend more or less upon its own special facts and peculiar circumstances. *(Schouler on Personal Property, Sec. 117.)*

"In *Railroad Company vs. Deal, 90 N. C., 111,* the exceptions to the general rule and the reasons for them are clearly and distinctly stated by Merriam, J., who said: ' The general rule of law is that buildings and other structures erected on land for the better enjoyment of it become identified with it, part of, and go with the land, and the tenant has no right at any time to remove them. Anciently, the law was more strict in respect to making things erected upon and attached to the land, directly or ~~indirectly~~, a part of the freehold, than in modern times. As civilization has advanced and trade and the mechanic arts and other industries have multiplied and increased in development, and correspondinly in their necessities and wants of reasonable convenience, there has been a growing relaxation of the strict rules of law men-

tioned in their favor. It is the policy of the law to encourage trade, manufactories and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery and all such things certainly intended and calculated to promote them, are treated, not as a part of the land, but as distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure. Hence, if a house or other structure is erected upon land only for the exercise of trade and agriculture, no matter how it may be attached to it, it belongs to the tenant, and may be removed by him during his term, and in some classes of cases, after it has ended; though the tenant after his term is over would, in going back upon the land to get his property, be guilty of a trespass and except in that respect the property would remain his. The exceptions to the general rule pointed out before are well settled, and the practical difficulty in any case arises in pointing out when the general rule or exception applies. The exception does not depend on the character of the structure or the thing erected, or whether it is built of one material or another, or whether it be set in the earth or upon it; but whether it is for the purpose of trade or manufacture, and not intended to become identified with and part of the land.'"

R. & N. Co. vs. Mosier, 14 Oreg., 520-1-2.

Of course in the present case, appellees now declare that the additions to the land were intended to be permanent and to enhance the value of the land itself, but the court will judge as to the nature of the additions as a matter of law, not by the present declarations of interested parties, but from all the facts concerning such additions. As was well said in a Massachusetts case, "The intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act."

Hopewell Mills vs. Savings Bank, 150 Mass., 521.

The improvements in question are not permanent, but constantly changing as they are taken up and replaced by others from time to time, and are also subject to lawful change by a change of location of the line of railroad, a sort of change which is frequently made on these long lines of railroads and which has been frequently made on this very road. It will not be pretended that for the purpose of straightening its line, of avoiding heavy grades, or providing better crossings of rivers, the company may not lawfully change its line, as it has done, and locate a new right of way through the public domain. There can be no doubt either that in case of such changes they could lawfully take up and remove from the abandoned portion of the land all of the rail, ties, bridges, culverts and telegraph lines for use elsewhere, and that the land thus abandoned would revert to the government.

The citation of these cases, and the argument based on them, may, at first glance, appear inconsistent with the position of appellant that the improvements in question are real estate, but this is not the fact. Appellant seeks to tax these "improvements" as "real estate" solely on account of the statutory definition of those terms contained in section 2807 of the Compiled Laws of New Mexico of 1884, which is printed with the opinion of the court. This is distinctly set out in appellant's briefs, and was also stated on the oral argument.

V.

In deciding the three cases the court has failed to notice a material difference between the case for Valencia county taxes and the cases for Bernalillo county taxes.

Cases numbered 106 and 170 were brought to recover taxes levied in the county of Bernalillo. The agreed statement of facts set out in the opinion of the court was made in case 106 only. Case No. 169 was brought for taxes levied in the county of Valencia, and, as appears by the record in that case at pages 80 to 84, 60.7 miles of the railroad run over land which was held in private ownership at the time of the grant. This fact is admitted by defendants, the mileage, however, being put at "about 58 miles." Attention was called to this difference in the original brief for appellant, but it does not appear to have attracted the attention of the court.

By reference to the act of congress it will be seen that the second section is the one which grants the right of way through public land, and is the one which contains the clause exempting the right of way from taxation. By every rule of construction the right of way exempted from taxation must be held to be the one granted by that name in the same section which contains the exempting clause, and that is only through the public land.

The right of eminent domain is conferred on the railroad company by section seven of the act of Congress, but in that section the phrase "right of way" is not used, but, after detailing the various steps which may be taken to acquire the land, it is declared that the company shall "thereupon acquire full title to the same for the purposes aforesaid."

It may well be argued that while Congress was willing to exempt from taxation any portion of the public domain which might be taken by the railroad company for its use, yet it was not willing to withdraw from taxation land already held in private ownership and subject to be taxed. The difference in the language of the two sections, the

careful avoidance of the term "right of way" as to the land acquired from private ownership, strongly countenances this view. Certainly there is enough in this difference in the language to admit of "reasonable contention" and to establish the existence of something more than a "well founded doubt" as to the intent of Congress to exempt the land held in private ownership at the time of the grant.

Certainly as to these sixty and seven-tenths miles in Valencia county, the decision of the supreme court of New Mexico is wrong and should be reversed to this extent, at least, and the case remanded for proper proceedings as to the tax levy upon this portion of the railroad. There is no difficulty about this as will be seen by reference to the record at pages 80-1, where it will be seen that this portion of the railroad was assessed separately from the other portion which runs over what was public domain at the time of the grant.

It is respectfully submitted that the foregoing statement shows that there is much involved in the decision of the cases as to which there has been no argument before the court, and some matters of importance which the court appears not to have noticed: and that the ends of justice will be best served by giving opportunity for a full presentation of the views of counsel as to such things, upon a rehearing.

F. W. CLANCY,
Counsel for Appellant.

No. 169.

FILED
APR 3 1899
JAMES H. McKENNEY,
Clerk.

PETITION FOR REHEARING. Con rehear

Brief of Clancy for Appt.

Supreme Court of the United States,

OCTOBER TERM, 1898.

Filed April 3, 1899.

No. 169.

TERRITORY OF NEW MEXICO, *Appellant,*

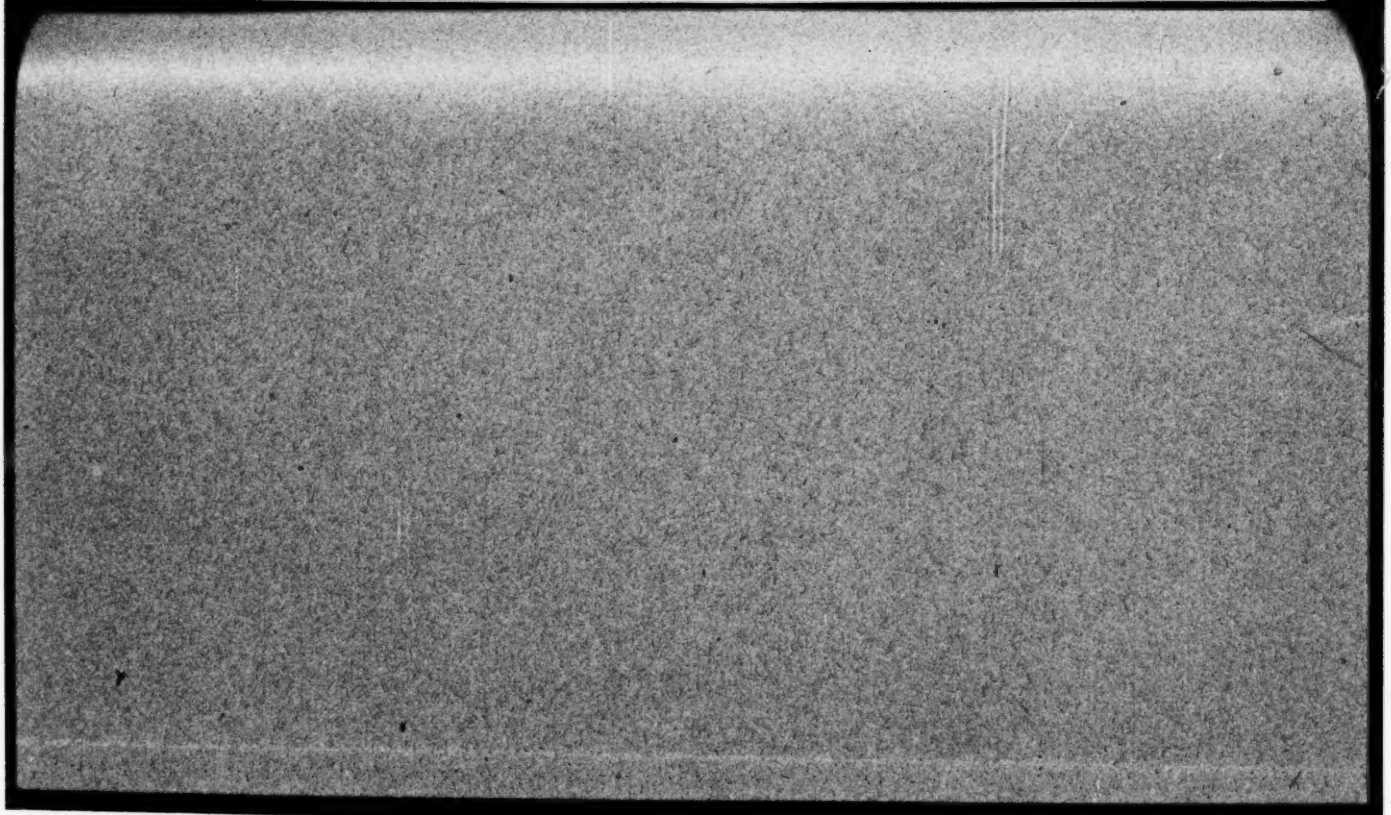
VERSUS

UNITED STATES TRUST COMPANY, ET AL.

APPEAL FROM NEW MEXICO.

F. W. CLANCY,
Solicitor for Appellant.

NEW MEXICAN PRINTING COMPANY, SANTA FE, N. M.



Supreme Court of the United States,

OCTOBER TERM, 1898.

Territory of New Mexico,
vs.
United States Trust Company, et al. } No. 169.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Territory of New Mexico, appellant in the above entitled cause, in accordance with the permission granted by the court on the 6th of March, 1899, respectfully prays the court to order a rehearing of this cause for the reason that the court has failed to notice a material difference between this case, which relates to taxes in Valencia county, and cases numbers 107 and 170, which relate to taxes in Bernalillo county, the three cases having been argued together, the difference being that in Valencia county only a little over one third of the railroad runs over what was public domain at the time of the passage of the act of Congress which granted the exemption from taxation, and no exemption was granted or intended by the second section of the act, as to lands held in private ownership and thus already subject to taxation by the territories. And your petitioner in accordance with the permission of the court, respectfully submits herewith as a part hereof, a brief on the question of the validity of so much of the taxes imposed in Valencia county as were levied upon that portion of the railroad running

through what was private property at the time of the passage of the act of Congress.

TERRITORY OF NEW MEXICO,
by F. W. CLANCY,
Solicitor for Appellant

I certify that I have examined the record in the case referred to in the foregoing petition for rehearing, and that, in my opinion, said petition should be granted.

F. W. CLANCY,
Solicitor for Appellant.

BRIEF.

In taking advantage of the leave given to present a petition for a rehearing in this cause, and a further brief as to the validity of the Valencia county taxes, it will be assumed for the purposes of the present argument that the decision of the court, so far as the two Bernalillo county cases are concerned, and so far as this case affects that portion of the railroad which runs over what was public domain in July, 1866, is to be taken as established law. This assumption is necessary to a proper discussion of the single question to which attention is invited, because that question can be of no practical importance unless the decision as made is to remain unaltered. A moment's reflection will show this to be so. The distinction to which attention has been drawn between the condition of land which was public domain and granted by Congress by the second section of the act, and land which was private property and acquired under the seventh section of the act, is of no consequence unless the court adheres to what it has decided as to the proper construction of the second section.

Of course, this may necessitate an argument from a somewhat different point of view from that heretofore occupied by appellant, but this is not to be regarded as any abandonment of the positions taken in the former petition for rehearing in all of the cases, which is still pending, and which it is earnestly hoped may yet be granted by the court.

As a matter of convenience it may be well here again to summarize what the court has already decided as to the second section of the act of Congress, as an assistance to the intelligent consideration of what is to follow:

The court has in effect decided two things:

First. That congress in granting "a right of way" in 1866 intended to grant something, which

the court does not positively or exactly define, but which was corporeal property, (notwithstanding the fact that at that time, and for years thereafter, such a meaning for "right of way" was unknown); and

Second. That Congress intended to exempt the railroad and telegraph line from all taxation where tney might run through the public domain in the territories, this intention being evolved only by the application of the common law rule that whatever is affixed to realty becomes a part thereof.

It will also be well at this point for convenience of reference, to set out in full the two sections of the act of Congress which are to be considered.

They are as follows:

SEC. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 7. And be it further enacted, that the said Atlantic & Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or

premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterest ed commissioners, who may be appointed upon application by either party to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rignts of said company to enter upon the premises taken, or to do any act necessary and proper to the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner

of said premises taken, at a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by an infant, *femme-covert*, *non-compos*, insane person, or person residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee-simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine the kinds of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

The question now is as to whether Congress by

the language of exemption in the second section of the statute, intended to exempt also the railroad and telegraph line running over land which might be acquired under the seventh section from private owners.

In the examination of this question as in all others relating to claims of statutory exemptions from taxation, we are to be guided by the salutary rule of construction heretofore laid down by the decisions of this court and expressly affirmed in the last paragraph of the opinion in the present case, which will be well shown by a few brief quotations. This court has held:

That "exemptions from taxation are to be strictly construed;" (*164 U. S., 666.*)

That "when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power" to tax: (*146 U. S. 294.*)

That "there must be no doubt or ambiguity in the language used upon which the claim to exemption is founded;" (*161 U. S., 146.*)

That "no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption where such claim is not founded upon the plain and clearly expressed intention of the taxing power;" (*161 U. S., 146.*)

That "the existence of a well founded doubt is equivalent to a denial of the claim:" (*161 U. S., 177.*)

That "nothing can be taken against the state by presumption or inference;" (*18 Wall. 226.*)

R. R. Co. vs. Dennis, 116 U. S., 668–9.

In short, as is distinctly stated in *18 Wall. 226*, to justify a claim of exemption from taxation, the proof of intention to exempt must, like that which will authorize conviction of crime, "be clear beyond a reasonable doubt."

POINTS AND AUTHORITIES.

I

By the very terms of the second section of the statute, the grant and exemption are co-extensive, and extend to nothing beyond that section.

Let us look at this section in which only the exemption appears, and see what is thereby granted, and what is exempted, without at this time troubling ourselves as to the meaning of the terms which set out the subject of the grant and of the exemption.

This section declares "that the right of way,"—not *a* right of way—, "through the public lands"—not merely in the territories but in the states as well,—"be and the same is hereby granted to the said Atlantic & Pacific" etc. It further declares that "said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain",—whether in Missouri, Kansas, New Mexico or California,—"and the right of way shall be exempt from taxation within the territories of the United States."

"The right of way through the "public lands" is granted; and "the right of way shall be exempt from taxation within the territories of the United States." Clearly that which is exempted from taxation is the same thing as that which is granted, whatever it may be, except that the exemption is limited to the territories. No other "right of way," is mentioned or hinted at. "The right of way" is granted, and "the right of way" is exempt,—nothing more.

This is a conclusion which "simply rests on the terms of the statute" and is in harmony with those rules of construction, so often enunciated by this court, which assert that "exemptions from taxation are to be strictly construed," and that "no implication will be indulged in" which will have the effect of

expanding the ordinary meaning of the language used.

But the burden is not on the territory to show the limited character of the grant. The *onus* is on the appellees to show its more expanded character, and all that appellant need do to defeat the claim, is to indicate "the existence of a well-founded doubt," which this court holds is fatal to any such claim of exemption.

II.

The seventh section of the act does not authorize the railroad to acquire from individual owners the same estate in lands, which the court holds was granted by the second section.

Counsel for appellant feels compelled to state that his own construction of the seventh section, if unembarrassed by the decision of the court which still stands, would be that thereunder the railroad company could acquire only an easement,—a mere right of way in the strict sense of the term,—and for this construction would rely upon the general principle that the taking of private property for public use must be as limited as possible consistent with the public interest, and would cite the opinion of this court as to acquisition of lands under such a statute by railroad companies.

This section gives the company the power "to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road." In Alabama, by the terms of its charter, a railroad company, this court says, "was given power to purchase, hold, lease, sell and convey real, personal and mixed property, so far as it should be necessary for the purposes mentioned in the act, namely, to construct and operate

the specific railroad authorized therein." Clearly this was a broader power than that given to the Atlantic and Pacific Company, which can only "purchase, take and hold" lands; and yet this court held that under that power, the company acquired "merely an easement on the land."

East Alabama R. Co. vs. Doe, 114 U. S., 350–1.

And a distinguished member of this court once declared, in a state where the statute clearly authorized the appropriation of the fee or the use, "that, unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use."

Keener vs. U. P. R. Co., 31 Fed., 128.

As has been well said in a case from which quotation has already been made in a former brief in these cases:

> "The doctrine of eminent domain rests upon the presumed necessity for the taking of private property for public use. The taking, to be consistent with this theory, must therefore ordinarily be limited to the apparent necessities of the public."
>
> *Railway Co. vs. Telford, 89 Tenn. 297.*

In numerous cases the taking of land by railroad companies, whether by purchase, or under the power of eminent domain, no matter how strong the words of conveyance or how broad the terms of the statute, has been held to vest only an easement, the use only, a mere right of way. Some of these cases have been set out with some fullness in the petition for rehearing heretofore filed, and will be only cited here.

Jones vs. Van Bochove, 61 N. W., 343.
Blakely vs. R. R. Co., 64 N. W., 972–3.
Robinson vs. R. R. Co., 59 Vermont, 426.
Kellog vs. Malin, 50 Mo., 499.

Railway Co. vs. Telford, 89 Tenn., 297.
Quimby vs. R. R. Co., 23 Vt., 393.
M. & O. R. Co. vs. Postal Tel. Co., 41 L. R. A., 406.
Taylor vs. R. R. Co., 38 N. J. L., 30.
Nelson vs. Fleming, 56 Ind., 322. (Dissenting opinion of Biddle, J.)

The court may well find reasons, founded on both principle and precedent, for applying to the construction of the seventh section, which authorizes the taking of private property under the delegated sovereign power of eminent domain, a very different line of reasoning from that which it applies to the second section by which Congress exercises its power over the public property of which it makes a direct donation, unhampered by any consideration as to the rights of individual owners or the withdrawal from taxation of property already subject thereto.

There may be a well-defined difference as to the meaning which the court gives to the second section where Congress deals with the public domain, over which it has unlimited control, and that which it will give to the seventh section which deals with the taking of private property for public use. As to the former, it may be held that there is no consideration, whether constitutional or of public policy, by which to restrain, limit or qualify the language used, or even to prevent an expansion, by implication, of the language used; while as to the latter, it might be held that very different considerations arise as to the exercise of the sovereign power of taking private property for public use, and that the case in *114 U. S. 350*, furnishes the proper rule.

In the light, however, of the reasoning of the court as to the nature and character of railroads and their business, the necessity for exclusive occupation of land used for their purposes, and the consequent conclusion that they must have more than an easement

in such land, and, if possible, the fee, it would seem that the court has destroyed all foundation for any argument to limit or restrain the language of the seventh section so that the company can thereunder acquire only the use of the land of private owners.

But no matter which construction is given to the seventh section, whether the company acquires only an easement thereunder or a full title in fee, it is equally clear that the exemption of what was granted in the second section, cannot be considered applicable, as the estate is different from that which the court says was granted by Congress in the second section.

An examination of the language of the seventh section is convincing that its natural import, unrestrained by any such considerations as those above adverted to, is to authorize the railroad company to acquire a title in fee to the land necessary for its purposes, subject only to the limitation, perhaps, that it shall be used only for railroad purposes. The first lines of the section, which has been hereinbefore quoted in full, authorize and empower the company "to enter upon, purchase, take and hold land or premises that may be necessary and proper for the construction and working of said railroad." Further along it is provided that compensation shall be made to the owner, to the extent of "the value of the premises taken." In case the owner and the company can not agree as to such value, commissioners are to be appointed who "shall appraise such premises at what would have been the value thereof if the road had not been built;" and upon the payment of the amount of the appraisement into court "said premises shall be deemed to be taken by said company, which shall thereby acquire *full title* to the same for the purposes aforesaid." There are further provisions for an appeal from the appraisement and for the payment of

costs by the party appealing if he does not obtain a verdict more favorable; and the payment into court of a sum equal to that finally awarded, "shall be held to vest in said company the title of said land." Then there are provisions as to the taking of lands of persons under disabilities, which shall have the same effect as those concerning the lands of other persons, "and the *title* of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust." Provision is also made for the acquisition of any right or claim to land or any interest therein which may be "less than a fee simple." In case of unoccupied lands proceedings may also be instituted "for the purpose of ascertaining the value of, and of acquiring title to, the same."

It is to be noted that all of the language used in this section looks toward the acquisition of absolute ownership of the land. The company is authorized to purchase, take and hold the land; the damages to be assessed are to be the value of the land, and it is repeatedly asserted that the company shall acquire *full title* to the land. The provision for acquiring interests less than a fee simple, in itself implies that the other provisions mean the acquisition of a full title in fee. It is to be noted that nowhere in this section is it stated that the company shall acquire a "right of way," whatever that phrase may mean.

This court, in its opinion, has not undertaken to classify or nominate the interest which was granted under the term right of way. It is so far new to the jurisprudence of the country that we cannot be sure of its name or precise nature. It is made certain only that it "is real estate of corporeal quality."

Now, the unnamed, amorphous estate of corporeal quality which the court holds was granted by the name "right of way" in the second section, certainly

does not constitute the same sort of title as that obtained under the seventh section, which is defined to be "full title" to the land "for the purposes aforesaid." There can be no doubt as to the sort of title intended by this language when viewed in the light shed on the subject by the argument in the opinion of the court as to the nature and character of railway companies and of their business, which require exclusive use and occupation of the land. Clearly "full title," thus viewed, must mean a complete estate in fee, and "for the purposes aforesaid" cannot be held to do more than limit the uses to which the company may put the land.

If it were merely doubtful as to whether the title which may be acquired under the seventh section is the same title as that granted by Congress in the second section, according to the well-settled rule of construction hereinbefore referred to, the doubt must be resolved in favor of the appellant, as "a well founded doubt is fatal to the claim ' of exemption.

III.

The assessments are so made as to show separately the property which is on land which was public domain at the time of the grant and on land which was held in private ownership.

The correctness of this statement will be at once seen by reference to pages 80 to 84 of the printed record, where there will be found one assessment of the property on land which was public domain of the United States when the right of way was granted, 33 miles in length, and another item of assessment of like property on land which was held in private ownership at the time of the grant, 60.7 miles. This separation of the two classes of property, taken in connection with the allegations of the intervening petition of appellant, which petition appears at pages

30 to 32 of the printed record, makes it perfectly easy to ascertain exactly how much is due upon that portion of the property assessed which is upon land formerly held in private ownership.

Any question as to the irregularity or correctness of the assessment is not before this court at this time. Certain pleas were filed by defendants in the district court which set up some defenses of this character, but they were never considered by the court below as will be seen by reference to pages 77–8 of the printed record. The district court refused to pass upon the question of the sufficiency of the pleas for the reason that the petition and matters therein set up, fell within the decision of the supreme court of the territory in the matter of a like previous petition, and were therefore not sufficient to entitle the petitioner to the relief sought, and the petition was accordingly dismissed.

The record is not in such condition that this court could pass finally upon the correctness and legality of these assessments, if any ground of objection thereto exists, but the appellant is quite prepared to maintain the propriety and legality of the assessments and of all that is claimed thereunder.

It may be well, however, to call attention to the sections of the statutes under which these assessments were made, and which are referred to in the assessments themselves as sections 2847 and 2848. Those numbers referred to the Compiled Laws of 1884, and the same sections are now to be found in the later compilation of 1897, as numbers 4055 and 4056, and read as follows:

> SEC. 4055. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of.

county commissioners, with all arrearages of taxes, which should have been assessed and paid in former years, charged thereon, or in case of the failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section.

SEC. 4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county, are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value, and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list, following the entries made by the clerk, and such entries shall be designated as, Additional assessments, and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him.

In the pleas of defendants it is not in any way suggested that any appeal was ever taken to the board of county commissioners, as provided in the last quoted section, nor that the interested parties were in any way deprived of an opportunity so to appeal.

Stanley vs. Supervisors, 121 U. S., 550.

It is respectfully submitted that the matters herein treated of, were not considered by the court when its former decision was made, the distinction between this case and the others with which it was argued not having attracted the attention of the court; and that they are of sufficient importance to require that opportunity be given for their full presentation.

F. W. CLANCY,
Counsel for Appellant.

...E FOR APPELLANT ON RE-HEARING.

...ber Oct. 25, 1899.

...me Court of the United States.

OCTOBER TERM, 1899.

No. 1...

...E TERRITORY OF NEW MEXICO, APPELLANT,

v.

...HE UNITED STATES TRUST COMPANY OF NEW YORK, ET AL.

...PEAL FROM NEW MEXICO.

F. W. CLANCY,
Solicitor for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 169.

TERRITORY OF NEW MEXICO
v.
UNITED STATES TRUST COMPANY, OF NEW YORK, *et al.*

Additional Brief for Appellant on Rehearing.

In taking advantage of the leave given to file an additional brief in this case, it is not the intention of counsel for appellant to add to what has already been said in former briefs on the merits of the question now under consideration. The matter has been sufficiently presented for the court to see what is involved, and it does not now seem that anything can be added, on paper, which can assist the court in its deliberations upon the merits.

There are, however, some things urged in the brief for appellees, filed on the 3d of April, 1899, which call for reply. That brief is devoted principally to an attempt to show that "this court ought not to consider the question sought to be presented." Perhaps the fact that the court proposes to consider it, as shown by its last order, ought to be enough, and possibly the present argument is superfluous; but it is preferable to err in the direction of doing too much rather than too little.

I.

The question is clearly presented by the record.

Counsel for appellees declare that it is not. What is the question? It is as to whether or not the exemption declared by the second section of the act of Congress of 1866, extends to anything beyond what is granted by that section, and exempts what may be acquired by the railroad company under the authority of the seventh section of the statute.

In their recent brief, counsel for appellees, at pages 3–4, give a quotation from appellant's petition which distinctly sets up the claim that the exemption extends only to the right of way through the public domain, and does not extend to that portion of the road which passes through land not included in such domain; and the assessments, one of which is copied at the same place in that brief, plainly distinguish between, and separate, the two, and were made just before this proceeding was begun, clearly for the purpose of emphatically and distinctly pointing out the difference. And yet it is gravely contended that the record fails to present the question of this difference. Comment is unnecessary.

Appellees insist, however, that, because the collector did not assess the land itself where the road passed over what was not public domain, the assessments are utterly invalid, and that he must have proceeded on the theory that what he did assess was personal property; and it is further insisted that the entire case of appellant was predicated upon the idea of the superstructure of the railroad being personal property. It is also declared that "the sole claim made by the Territory, in the district court, in the supreme court of the Territory, and heretofore in this court," was that the

superstructure sought to be taxed was personal property. These mistakes of counsel for appellees are inexcusable. The assessments as made, are in language clearly intended to bring them under the first and second subdivisions of section 4019 of the compiled laws of 1897, which section has been heretofore quoted in appellant's original brief at page 10, and in appellee's brief of April 3, 1899, at page 17, and which distinctly declares such "improvements" to be real estate. Moreover, in appellant's original brief, at page 10, and in its reply brief, at page 3, it is carefully set out that it is not "claimed that the property in question can be taxed as personal property"; that "it must be classed as real estate under our statute"; and that "at no stage of these proceedings, from their initiation in the district court in New Mexico, to the present time, has the Territory claimed this property to be personal property." It has always been consistently asserted that it is real estate, and, under the statute, separable, for purposes of taxation, from the soil to which it is attached.

He would have been a singularly bold assessing officer in New Mexico who, in the face of the decision of this court in *East Alabama R. Co. v. Doe, 114 U. S., 350*, that a conveyance of land to a railroad company for the construction of a railroad "in fee simple," gave "merely an easement on the land," would have undertaken to assess land acquired in like manner in New Mexico, with the improvements thereon, as a whole, thus running the risk of being held to attempt to unite things corporeal with an incorporeal hereditament, when the statute clearly permitted the assessment of those things as real estate, regardless of the condition of the title to the land to which they might be affixed.

Appellees ought not now to be heard to complain that the assessment does not cover all that might have been taxed. The error, if any, was in their favor. If this court shall declare that, under the seventh

section of the act of Congress, the railroad company secures absolute title to the land acquired, it will then be proper to assess the property as fully as appellees desire, and not before. But the assessment, even then, under the New Mexican system, would properly be of the land as one item, and of the improvements thereon as another. Reference to the statute above referred to, and to the forms of assessment rolls in the record (page 38) made in pursuance of the statute quoted as section 2834, on page 46 of appellees' original brief, and as section 4044 at page 17 of their brief now under consideration, will show how this is done. These forms are, as a whole, substantially, and in this particular exactly, such as have always been used ever since the passage of the statute in 1880.

What is here said is to be considered as a reply also to what is urged under the "Third Point" of appellee's brief of April 3d.

The confident assertion of counsel for appellees on page 8 of their brief, that, on the hearing of this case in the district court, "It was never suggested * * * in any manner, that there was the slightest difference * * * between the Valencia county case and the case already decided by the supreme court," is somewhat singular, in view of the fact that neither of the learned gentlemen whose names are signed to the brief, was present at that hearing and they certainly do not testify from personal knowledge; while the petition in this case, which was before the court at that time, clearly indicated the difference in the only way proper on the record. If I may be permitted also to testify, on the doubtful theory that an infraction of propriety on one side of a case justifies another on the opposite side—it may at least palliate the offense—I will say that my recollection is that I did mention to the district judge the difference be-

tween this case and the others, and that he thought, in view of the sweeping character of the opinion of the supreme court of New Mexico, that it was immaterial. In the supreme court of the Territory the brief filed for appellant was a hasty reprint of the earlier briefs, with some changes in arrangement, and was made only for the purpose of avoiding a possible chance of dismissal for failure to comply with a rule of the court. I cannot now, from memory, testify as to whether or not anything was said in that court about the difference between the cases; but it is significant that the curiously-worded motion of appellees was denied—not "sustained," as counsel for appellees state on page 10 of their brief of April 3d—by that court. (*Record, page 87.*)

The motion set up that the court had in the earlier case "decided every question involved in this case," and that therefore "this case is *stare decisis.*" The court was not willing to commit itself to this statement, and denied the motion, although willing to affirm the case on the authority of their previous decision; but it did not, as appellees assert, "determine that there was no difference between the two cases, either in fact or law." It appears, rather, to have refused so to determine.

II.

There can be no doubt that this court has jurisdiction to consider this case.

Counsel for appellees assert that because an assignment of errors was not annexed to and returned with the record of this case in accordance with section 997 of the Revised Statutes, this court has no jurisdiction. Such assertion argues either great desperation or great ignorance on the part of the asserter, and there can be no reason to believe that any of the learned gentlemen who appear for appellees are ignorant.

This court has uniformly refused to consider the provisions of section 997 as mandatory or jurisdictional, and has put its view of the law in a rule of practice, in which it has declared that, at its option, it "may notice a plain error not assigned or specified;" and has decided that errors specified according to the rule will be considered, even if the statute has been disregarded. In some cases it has examined errors relied on, although no assignments of errors had been made in accordance with either the statute or the rule.

School District v. Hall, 106 U. S., 428.
Hecker v. Fowler, 1 Black, 95.
Farrar v. Churchill, 135 U. S., 613.
Gregory C. M. Co. v. Starr, 141 U. S., 223.

Errors were specified in this case as required by the rule, and in accordance with the usual practice of the court, and are sufficiently set up to raise every point discoverable in the record.

III.

This case should be reversed as a whole.

Inasmuch as the first petition for a rehearing in all of the cases has not been passed upon, and a rehearing has been granted in this case without any limitation, it seems pertinent briefly to urge that any reversal of this judgment should go to the whole case and not be limited to the difference between this and the other cases.

Appellant respectfully calls attention to what is set out in its first petition for rehearing on the other points involved, and insists that the arguments and authorities cited show conclusively:

First, that the decision of the court as to the meaning of the phrase "right of way" in the act of Congress, is in utterly irreconcilable conflict with its own earlier decisions;

Second, that in determining the meaning of said phrase, the court is at variance with the weight of authority in the United States;

Third, that, in 1866, when Congress acted, no one had ever dreamed of such a meaning for right of way as is now given to it;

Fourth, that the application to this case, of the common law rule that what is affixed to the soil becomes a part thereof, is not in harmony with the rules of construction heretofore laid down by this court in cases of claimed exemptions from taxation, nor with the weight of authority in the United States, and, by a highly artificial implication, expands the meaning of the language of Congress far beyond its ordinary, obvious and necessary meaning.

The reasons and authorities which establish these positions, are set out at some length in the petition for rehearing, and will not be here repeated.

It is respectfully submitted that the case should be reversed and remanded with directions to enter a decree for all which the appellant has claimed.

F. W. CLANCY,
Counsel for Appellant.

FILED
OCT 21 1898
JAMES H. McKENNEY,
Clerk.

Nos. 106, 169 and 170.

Brief of Sterry, Kenna & Dunlap for Appellees

IN THE

Supreme Court of the United States.

Filed Oct. 21, 1898.

OCTOBER TERM, A. D. 1898.

THE TERRITORY OF NEW MEXICO, *Appellant,* vs. THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, Receiver of the Property of the Atlantic and Pacific Railroad Company, *Appellees.*	Nos. 106, 169 and 170.

BRIEF OF APPELLEES.

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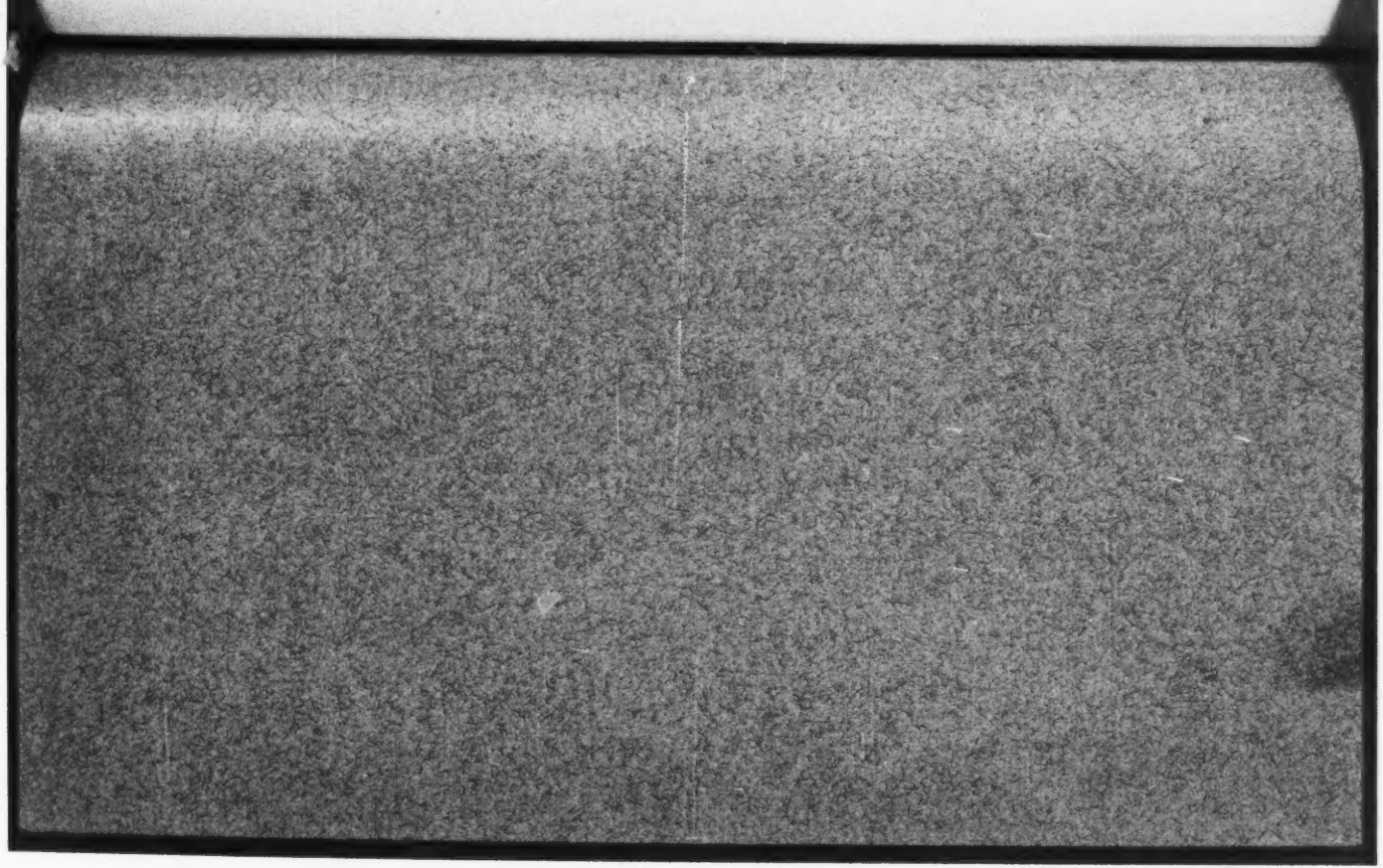

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

THE TERRITORY OF NEW MEXICO, Appellant, vs. THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, Receiver of the property of the Atlantic and Pacific Railroad Company, Appellees.	Nos. 106, 169 and 170.

BRIEF OF APPELLEES.

Statement of Case.

CASE NO. 106 (16,578).

The statement of this case made by the appellant is not satisfactory to us, and we therefore present to the Court the following as a more complete and detailed statement of the facts:

The Atlantic and Pacific Railroad Company was incorporated by the Act of Congress approved July 27, 1866 (14 U. S. Stat., p. 292), "to lay out, locate and construct, finish, maintain and enjoy a continuous railroad and telegraph line, with

the appurtenances, from a point at or near the town of Springfield, Missouri, to the Pacific Ocean, by way of the Canadian River, Albuquerque, Agua Frio, along the head waters of the Colorado Chiquito, and thence along the 35th parallel of latitude to the Colorado River, and from there, by the most practicable route, to the Pacific Ocean," and was invested "with all the powers, privileges and immunities necessary to carry into effect the purposes" expressed in the act.

By the second and seventh sections of the act, "a right of way" was granted to and authorized to be acquired by the company for its railroad, telegraph line and station buildings etc., and this "right of way" was, by the express terms of the act, to be exempt from taxation in the territories of the United States. Under this act the Atlantic and Pacific Railroad Company, prior to 1880, located its line of road through Bernalillo and Valencia Counties, in the Territory of New Mexico, including "all necessary grounds for station buildings, workshops, depots, machine shops, switches, turntables, water stations," side tracks, etc. Subsequently, between 1880 and 1881, the railroad company constructed its line of railroad in New Mexico from Isleta Junction, New Mexico (a junction point with the Atchison, Topeka and Santa Fe Railroad Company, and about fifteen miles west of Albuquerque), to and across the Colorado River, a distance of about five hundred and sixty miles. That part of the railroad constructed in New Mexico was built on the line of definite location previously made, and 73 miles and 142 feet of it was situated in Bernalillo County, and 93 miles and 458 feet of it was situated in Valencia County. These are the only counties in New Mexico touched by the constructed portion of the line.

In January, 1894, receivers were appointed to take possession of the entire property of the Atlantic and Pacific Railroad Company in New Mexico, Arizona and California, in actions

commenced in the three jurisdictions, to foreclose a second mortgage executed by the company. Subsequently, in the fall of 1895, an additional foreclosure suit against the company was brought in each of these jurisdictions by the United States Trust Company, trustee under the first mortgage, executed by the Atlantic and Pacific Railroad Company, and in this last suit orders were made extending the existing receivership to this latter foreclosure suit.

The Atlantic and Pacific Railroad Company, up to January, 1895, and the receivers from time to time, until 1896, made returns to the assessors of Bernalillo and Valencia Counties of all the property of the railroad company subject to taxation in these counties, as required by the provisions of Section 2822 of the Compiled Laws of New Mexico, which is hereafter set out. These returns omitted the "right of way," including station grounds, etc., and the superstructure thereon, under the claim of the railroad company, and of the receivers, that the same was exempt from taxation in the Territory of New Mexico by virtue of the provisions of the second section of the act of July 27, 1866. The returns made by the railroad company in 1893, and by the receivers in 1894 and 1895, to the assessor of Bernalillo County, appear on pages 35 to 41, inclusive, of the transcript in case No. 106.

In 1895 the Board of County Commissioners of Bernalillo County directed the county assessor to place upon the assessment rolls of that county for that year an assessment of the entire superstructure of the railroad company, placed upon and permanently attached to its "right of way" in that county, at a value to be assessed by him for the year 1893, with an added penalty of one-fourth in value, upon the theory that it had been omitted for the year 1893 from the rolls. It also ordered to be placed upon the assessment rolls of that county, for the year 1894, the same property, with an added penalty of one-fourth in value, upon the same theory. It also ordered him to place upon the assessment rolls of that year

an assessment of the same property for the year 1895, with an added penalty of one-fourth in value of such assessment. The assessor, acting under these instructions, made such additional assessments, which were entered upon the assessment rolls of that county for the year 1895, so that the assessments for that year consisted of an assessment for the year 1893, an assessment for the year 1894, and an assessment for the year 1895, of the property claimed to be exempt, each of which was called an additional assessment for the year for which it was made. Copies of the assessment rolls, as they were made up by the assessor, under instructions from the board, and containing the original and additional assessments, are shown in the transcript in case No. 106, on pages 42 and 43. The total amount of the taxes levied against the assessments placed upon the rolls by the assessor, in addition to the taxes levied upon the property returned by the railroad company for the year 1893 and by the receivers for the years 1894 and 1895, amounted to the sum of $43,254.70, including $12,978 for the year 1893, $12,768.78 for the year 1894 and $16,585.14 for the year 1895.

On March 12, 1896, the Territory of New Mexico, through the District Attorney for the Second Judicial District, filed an intervening petition in the foreclosure suit brought by the United States Trust Company of New York against the Atlantic and Pacific Railroad Company *et al.*, asking to have the amount of taxes levied upon these additional assessments ordered paid by the receiver (Tr., 31–43). Upon the filing of this petition, an order to show cause was issued by the Court requiring the United States Trust Company, the Mercantile Trust Company (the second mortgagee) and the other defendants, together with the receiver, to show cause why the order asked for by the intervening petition should not be granted. Subsequently, the United States Trust Company and the receiver filed separate answers to this intervening petition (Tr., 44–50).

On the 28th of May, 1896, an agreed statement of facts was

filed in the case, which appears on pages 50 to 55 of the transcript (Tr., 50–55), and which we here insert for convenience.

AGREED STATEMENT OF FACTS.

" For the purposes of the hearing to be had upon the intervening petition of the Territory of New Mexico, in the above-entitled cause, and answers thereto of C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, and the United States Trust Company, it is hereby stipulated and agreed, by and between said above-named parties, that the following facts shall be accepted and received by the judge or court in determining the questions involved as the facts in the case.

" That on and prior to January 1, 1892, the Atlantic and Pacific Railroad Company, under the provisions of its charter, definitely located its line of road and right of way through Bernalillo County, which said right of way so located involved all necessary grounds for station buildings, work shops, depots, machine shops, switches, side-tracks, turn-tables and water stations. That upon said right of way so located through the City of Albuquerque, in said county, was definitely located necessary grounds for station buildings, work shops, depots, machine shops, side tracks, turn-tables and water stations; and there was also located upon said right of way at the Atlantic and Pacific Junction, at Chaves or Mitchell, at Coolidge, at Wingate, at Gallup and at Manuelito, necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn-tables and water stations.

" That thereafterwards and prior to 1893 there was built and constructed upon said right of way by the Atlantic and Pacific Railroad Company from a point of junction with the Atchison, Topeka and Santa Fe Railroad Company at Isleta, fifteen miles south of Albuquerque, a railroad along said right of way, from said junction point to the Colorado river, in the Territory of Arizona; that the Atlantic and Pacific Railroad Company has, under an agreement with the Atchison, Topeka and Santa Fe Railroad Company, occupied and used the tracks of the last named company between the junction of the two railroads at Isleta and the City of Albuquerque as and for the railroad of the Atlantic and Pacific Railroad Company to the extent that its business required the use and operation of such railroad for itself; or in other words, under contract between the two companies the railroad of the Atchison, Topeka and Santa Fe Railroad Company through the City of Albuquerque to the junction at Isleta, a distance of about fifteen miles, is jointly used by the two railroad companies; said railroad running through the reservations for machine shops, etc., afore-

said, of the Atlantic and Pacific Railroad Company at Albuquerque; that the right of way so located by the Atlantic and Pacific Railroad Company and upon which it built its railroad, as aforesaid, runs through Bernalillo County, and is situated in Bernalillo County as follows:

"Commencing at the A. & P. Junction referred to, it runs thence in a westerly direction 4 miles 3,780 feet to the division line between Bernalillo County and Valencia County, and then after crossing a portion of Valencia County at a point known as Station 5,247 it again runs through Bernalillo County 68 miles and 44 feet to the west line of the County of Bernalillo, being the west line of the Territory of New Mexico; which said right of way, outside of the reservation for station grounds, etc., was located, and is of the width of 200 feet, being 100 feet on each side of the center of the railroad track located thereon.

"That in due time the former receivers of the property of the Atlantic and Pacific Railroad Company appointed by this court returned to the assessor of Bernalillo County as property belonging to said railroad company, taxable in said county, certain property, which was and is described in said returns as follows, to wit:

"List of personal property belonging to, claimed by, or in the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western Division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico.

"The line of its road running through the Counties of Bernalillo and Valencia in said Territory of New Mexico; thence through the Counties of Apache, Navajo, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the Counties of San Bernardino and Kern, in said state, to the western end of said line, and its terminus at Mojave, in said County of Kern, a total distance of 805.86 miles, the total mileage of said line owned by said company in said Territory of New Mexico being 166.6, of which 73.142 are in Bernalillo County, and 93.458 miles are in Valencia County.

"And the receivers of the property of said company make a full report of all of its personal property as follows, to wit:

"All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars and all other equipments owned, possessed or used by said receivers or said company upon the entire line aforesaid	$452,960
"Track tools, and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law	

library, books, stationery, supplies and material, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito	78,000
" Personal property within the city limits of Albuquerque	200,000
" Personal property within the city limits of Gallup	5,000

" That the above and foregoing was all the property returned for taxation in Bernalillo County b said receivers or by the railroad company itself; and that the same was made as the assignment of the property of said company subject to taxation in said county for the year A. D. 1895; that the county assessor of Bernalillo County in the year 1895, under the direction of the Board of County Commissioners of said county, placed on the assessment roll an assessment of property against the Atlantic and Pacific Railroad Company for the year 1893. A true and correct copy of the assessment roll showing such assessment so placed thereon is filed with this as a part hereof, and as 'Exhibit 1,' which said exhibit shows the taxes levied, together with the values and penalties. That at the time the said assessor, under the instructions of said Board, placed upon said assessment roll certain property claimed to be taxable property belonging to said railroad company, which was omitted from taxation for the year 1894. A true and correct copy of the assessment so made is shown by 'Exhibit 2' herewith filed and made a part hereof.

" That the said assessor at the same time placed upon said assessment roll property claimed to have been omitted and belonging to said company for the year 1895, a true and correct copy of which said assessment roll, with said last-named assessment placed upon it, is shown by 'Exhibit 3,' hereto attached and made a part hereof and filed herewith.

" That these exhibits show precisely the descriptions of property entered by the assessor, the penalties added and the values and also the taxes levied thereon. 'Exhibit 3' also shows the description of the property as returned by the receivers.

" That all the property so placed upon the assessment roll by the assessor, outside of that returned by the receivers, was placed upon said assessment roll without the knowledge or consent of the receivers, or of said railroad company; that the entire property placed upon the assessment roll by said assessor, outside of the property returned by the receivers, constituted and constitutes an actual part and portion of the roadbed and railroad track thereon, situated on the right of way of the Atlantic and Pacific Railroad Company in Bernalillo County, in the Territory of New Mexico, and constitutes the railroad used and occupied by the Atlantic and Pacific Railroad Company under its charter and in accordance with the

provisions thereof; and the machine shops, station buildings, water tanks, section houses and other buildings of like character connected with and a part of the machinery used in the operation of said railroad; that each and every item of property described in the assessments so placed upon the said assessment roll, outside of the property returned by the receivers, is property that is actually and permanently attached to the right of way and station grounds of the Atlantic and Pacific Railroad Company, and constitutes an actual part and portion of the superstructure placed upon said right of way by said railroad company for its railroad and for its machine shops, turn-tables, side tracks, switches, water tanks, station buildings and other buildings of the same class and character actually used and needed in the operation of said railroad, and that no part of the same was, at the time of the placing of said assessments upon said assessment rolls by the assessor, detached from the actual right of way and station grounds of said railroad company; but, on the contrary, was firmly affixed thereto; that it was described as it was by the assessor in placing the same upon the assessment roll for the purpose of escaping the exemption from taxation contained in the second section of the act of Congress approved July 27, 1866, known as the charter of the Atlantic and Pacific Railroad Company, the assessor desiring to assess everything placed on the right of way separate from the right of way, no matter how permanently attached and affixed to the right of way.

"That during the year 1893 there were no receivers in possession of said property, and that said railroad was being operated by the railroad company itself, and, if any property was omitted to be returned for taxation which ought to have been returned to the assessor of Bernalillo County, it was the fault and neglect of the railroad company itself, and not the fault and neglect of the receivers afterwards appointed.

"That at Albuquerque upon the reservations and station grounds, there were situated the largest machine shops of the said railroad company, the general office building and such buildings as pertain to the headquarters of a railroad company; said buildings and reservation constitute the headquarters of the Western Division of the Atlantic and Pacific Railroad Company, and, since the appointment of receivers, of the receivers operating the same."

"That the assessor, in placing each of these three assessments upon the assessment rolls as stated, added to the actual value of the property one-fourth of such value, as a penalty for the failure on the part of the receiver to return such property for taxation.

"That in 1893 the railroad company, and in 1894 and 1895 the receivers, omitted all property that was firmly and fixedly attached to the right of way of said railroad company and to

station grounds, under the honest belief that the same constituted a part of the right of way and was exempt from taxation."

Subsequently the case came on to be heard, upon the intervening petition of the Territory and the answer thereto of the United States Trust Company and of the receiver, C. W. Smith and the agreed statement of facts (Tr., 31-42, 43, 44-51). Upon the hearing the Judge of the District Court ordered the receiver to pay to the treasurer of the County of Bernalillo the sum of forty-three thousand two hundred and fifty-four dollars and seventy cents ($43,254.70), the amount ascertained by a special master to be the aggregate of the taxes levied upon the additional assessments and penalties (Tr., 58, 59). An appeal was taken from this order by the United States Trust Company, and also by the receiver, C. W. Smith, who had obtained from the Court permission to take such an appeal (Tr., 59). The order appealed from was reversed upon hearing before the Supreme Court of the Territory, the Court determining that the additional assessments placed upon the rolls were illegal and void (Tr., 64, 65). An application was made for a rehearing, which the Court denied (Tr., 54-66). The decision of the Supreme Court was made December 18, 1896 (Tr., 62), and the opinion of the Court, delivered by the Chief-Justice, may be found upon pages 69 to 79 of the transcript.

CASE NO. 169 (16,171).

June 10, 1897, after the decision of the Supreme Court, the Territory filed in the District Court, in the same foreclosure action, another intervening petition, to recover taxes assessed and levied on the superstructure attached to the "right of way" of the railroad company in Valencia County (Tr., 16,671, pp. 30-32, inclusive, and 80-86). This intervening petition prayed for an order upon the receiver to pay thirteen thousand five hundred and eighty-six dollars and fifty-four cents ($13,586.54)

levied for taxes of 1892; twenty-three thousand and sixty-four dollars and sixty-three cents ($23,064.63) levied for taxes of 1893; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16) levied for taxes of 1894; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16) levied for taxes of 1895, and twenty-four thousand two hundred and seventy two dollars and ninety-two cents ($24,272.92) levied for taxes of 1896. The petition and exhibits disclose that the taxes sought to be recovered were based on assessments of the permanent structure on the "right of way" of the Atlantic and Pacific Railroad Company in the County of Valencia, and that the same questions were raised thereby as were involved in the first case herein, except that the assessments covered two years, 1892 and 1893, prior to the receivership, instead of one year, as in the prior case.

An order to show cause was issued and served upon the Mercantile Trust Company, the United States Trust Company and the receiver, and thereupon the United States Trust Company and the receiver filed five joint and several pleas to the intervening petition (Tr., 35–37).

Subsequently, at a hearing on the 23d day of June, 1897, the Court determined that the intervening petition (Tr., 30, 31) and exhibits (Tr., 80–86) disclosed a state of facts bringing the case within the decision of the Supreme Court in the prior case, and therefore dismissed the petition. From this order the Territory appealed to the Supreme Court, which, in August, 1897, affirmed the order of the District Court, upon the authority of its decision in the prior case.

CASE NO. 170 (16,672).

On June 10, 1897, in the same foreclosure suit, the Territory filed another intervening petition to recover taxes levied upon the assessment by the assessor in 1896 of the permanent structure upon the "right of way" of the Atlantic and Pacific Railroad Company in Bernalillo County, the amount thereof being sixteen thousand eight hundred and sixty dollars and sixty-one cents ($16,860.61) (Tr., 30-32). Orders to show cause were issued, and the United States Trust Company and the receiver, C. W. Smith filed a joint and several plea to the petition (Tr., 33-36). Upon a hearing, the District Judge found that the assessment was of the permanent structure and dismissed the petition (Tr., 36). An appeal was taken from this order by the Territory to the Supreme Court which, in August 1897, affirmed the order of the District Court (Tr., 40).

POINTS, AUTHORITIES AND ARGUMENTS.

FIRST POINT

From the terms of the act approved July 27th, 1866, read in the light of the history of the times when it was passed, it is clear that Congress intended to prohibit each one of the Territories through which it might pass from interfering by way of taxation with the railroad it was seeking to have built.

I.

In 1862 Congress passed the Union Pacific Act (12 Stat. at Large, 488). Congress subsequently amended this act several

times. By the terms of the original act and its amendments the Union Pacific and the other railroads mentioned in the act were given large subsidies in the way of the loan of millions of dollars, and of actually larger land grants than were given by Congress to any of the other railroads afterwards created by it.

In 1864, prior to completion of the Union Pacific, Congress created the Northern Pacific to build a line of railroad from Lake Superior to Puget Sound (3d Stat. at Large, 365).

Prior to the completion of the Union Pacific, and before work on the Northern Pacific was commenced, this Act of July 27th, 1866 was passed. It has been said that the passage of the Union Pacific Act was largely influenced by fear of a war with Great Britain, and it is equally proper to say that the passage of the Northern Pacific and Atlantic and Pacific Acts were equally influenced by fear of a war with France growing out of the attempt of the Emperor Napoleon to maintain Maximilian as Emperor of Mexico by a French army. Of course, there were many other considerations of public policy which brought about the passage of each of these acts, and which must be considered in any attempt to determine the full intention of Congress with respect to the railroads to be built under their provisions.

Many of the reasons inducing the passage of the Union Pacific Act are so applicable to and so fully explain the charters of the Northern Pacific and of the Atlantic and Pacific, and are so clearly and forcibly stated by Mr. Justice DAVIS in delivering the opinion of this Court in the case of the U. S. vs. U. P. R. R. Co. (91 U. S., 72), that we quote from it at length. (The italics are ours.)

"Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning of particular provisions in it.

"Many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning

grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress, and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but even if this fear was groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true the threatened danger was happily averted, but wisdom pointed out the necessity of making suitable provision for the future. *This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and, so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise. This enterprise was viewed as a national undertaking for national purposes, and the public mind was directed to the end in view rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad, for the transportation of persons and property. With its construction, the agriculture and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army, and the Indians.*

"*It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.* * * *

"*Congress acted with reference to the state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was that it could not be worked out by private capital*

alone. It was a national work, originating in national necessities and requiring national assistance.

"The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

"It is true, the scheme contemplated profit to individuals, for without a reasonable expectation of this capital could not be obtained, nor the requisite skill and enterprise. *But this consideration does not in itself change the relation of the parties to this suit.* This might have been so if the government had incorporated a company to advance private interests and had agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. *But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end, the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.*"

See, also,

W. & St. P. R. R. Co. vs. Barney et al., 113 U. S., 618.
M. K. & T. R. R. Co. vs. K. P. R. R. Co., 97 U. S., 491.
U. S. vs. S. P. R. R. Co., 146 U. S., 570.
U. S. vs. D. & R. G. R. R. Co., 150 U. S., 1.
Wisconsin R. R. Co. vs. Forsyth, 159 U. S., 55.

The railroad to be built under the provisions of the Act of July 27th, 1866, was not only to have impressed upon it the usual and ordinary public functions and duties pertaining to railroads generally, but in addition thereto was to have impressed upon it the character of a national highway which the Government of the United States should at all times and forever have the free right to use in the way of running trains and cars upon terms to be fixed by it. For the convenience of the Court and to show how clear was the intent of Congress, and how applicable are the remarks of Judge DAVIS,

supra, we quote from Sections 1, 2, 3, 5, 7, 8, 9, 10, 11 and 20 of the act as follows :

"SEC. 1. * * * And said corporation is hereby authorized and empowered to lay out, locate and construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said state, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian river; thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth."

"SEC. 2. *And be it further enacted*, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water stations; and the right of way shall be exempt from taxation within the territories of the United States." * * *

"SEC. 3. *And be it further enacted*, That there be and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of

said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers. * * *"

"SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turn-outs, stations and watering-places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first-class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. * * *"

"SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners who may be appointed upon application by either party to any

court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid." * * *

"SEC. 8. *And be it further enacted*, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-eight.

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

"SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

"SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

* * * * * *

"SEC 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due re-

gard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act."

Under the decision of this Court in the case of Lake Superior and M. R. R. Company vs. United States (93 U. S., 442), the Eleventh Section of the act must be construed as reserving to the Government of the United States the right to use the constructed railroad for the passage of its trains and cars at any and all times upon such terms as Congress might choose to make. This reservation created an easement in the railroad for all time to come in favor of the Goverment.

Regardless of the exemption contained in the act, it would seem that if this railroad, when completed, was to become such a national highway as the act itself evidently intended it to become, it would be greatly against public policy to permit a mere municipal corporation of the United States like a Territory to interfere with it by taxation and thus give to such municipal corporation the power to destroy it. Congress, however, determined not to leave this question open, and, hence, in the second section of the act, expressly prohibited not only the territories but itself from exercising the right of taxation of the right of way within such territories.

II.

The condition of the country over which this road was to be built will be presumed to have been known to Congress at the time of the passage of the act. The right of way from Springfield, Missouri, by way of Albuquerque and the Colorado River, and from there on by the 35th parallel of latitude to the Pacific Ocean, would pass through portions of two States and three Territories. From 350 to 500 miles of line was to be through the Indian Territory where the grant of land in aid of the construction of this road was inoperative.

From 800 to 1,000 miles of this line would pass through those portions of the Territories of New Mexico and Arizona which were and still are the most arid and mountainous parts of these Territories. In each of these Territories the line would necessarily have to pass over a country that would not, as a rule, give any local support for the operation of the railroad when constructed. Of course, in each of these Territories, along the line fixed by Congress, there were many beautiful and fertile valleys, but the general character of the country precluded any thought or belief on the part of Congress, or of the persons named in the Articles of Incorporation that the railroad contemplated by the act would ever derive sufficient local traffic to pay operating expenses through these two Territories or either of them. In fact, a large portion of this 800 or 1,000 miles was almost as barren a desert as the 300 or 400 miles that was to be traversed by the road west of the Colorado River.

In view of the knowledge Congress had of these facts, it seems incredible to suppose that Congress intended to offer as an inducement to capitalists to put money into the building of this national line of railroad the exemption of merely the bare strip of desert and arid land, which is embraced within the limits of the " right of way ", and which was not then, and never could be, of any substantial value for purposes of assessment and taxation.

The first Section of the Act named as incorporators over one hundred and fifty men residing in twenty-five different States and five different Territories, among whom were many whose names will be recalled by this Court as the names of men who had at that time national reputations as statesmen, soldiers, financiers and railroad men. The Act did not authorize the company to issue any bonds to be secured by a mortgage. Congress by its selection of the names of these prominent men scattered from the Atlantic to the Pacific Ocean intended to procure, if possible, a popular national subscription. Congress in express terms said that

every citizen in the United States should have the right to subscribe for this stock. It was at a time in the history of this country when the people living in those States from which the incorporators were chosen were extremely loyal to the national government and also to the belief that it should be a strong government. Money was easy in those days and it is more than probable that Congress believed, owing to the then apparent success of the Union Pacific undertaking, that capital would be forthcoming without further governmental aid, to accomplish this great work if it placed men of sufficient character at the head of it to induce the confidence of the people in their integrity.

Counsel for appellant asserts on the last page of his brief that Congress gave with an extremely liberal hand a donation of 50,000,000 acres of the public domain to this company, and that, therefore, it could not have intended to give very much more. In making this statement counsel overlooked the fact that the grant of land in Missouri and in the Indian Territory was inoperative. It must be remembered that Congress was not giving this land as a mere gratuity, but giving it as a portion of its contribution towards the building of this great public highway in which it was to have a special use and interest, and over which it reserved absolute control.

In this connection it is important to remember that while Congress under the provisions of Section Eight, Article One, of the Constitution of the United States, as construed by this Court, had a clear right to exempt this right of way from taxation in the States in which it was to be located. If Congress had intended to exempt merely the strip of land itself separate and apart from the superstructure to be placed thereon it would undoubtedly have exempted the right of way in the States as well as in the Territories, as such exemption would have been of so little value for assessment and taxation that it would not have affected the revenue of any community in which such right of way might be located. If, however, Con-

gress intended to exempt the completed railroad, then there were many reasons why it confined this exemption to the Territories over which its jurisdiction was undoubted.

SECOND POINT.

It must be presumed that Congress knew the rule of the common law that fixtures attached to the freehold become a part thereof, and intended that this rule should apply to fixtures to be placed by the railroad company upon its right of way, so that such fixtures would become as completely a part of the right of way as the soil, the rocks and the trees composing the same at the time of the grant thereof.

I.

This rule of the common law has been universally applied by text writers and Courts, to permanent structures placed upon the "right of way" for the purpose of making a completed railroad. In Washburn on Real Property, Chapter 1, Vol. 1 (4th Ed.), Paragraph 3, the author states the rule as follows:

"Land is always regarded as real property, and, ordinarily, whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that *cujus est solum ejus est usque ad cœlum* in one direction and *usque ad orcum* in the other. Thus the roadbed, the rails fastened to it, and the buildings at the depots of railroads, are real property. And the rolling stock of railroads has been held to be a fixture to such real property."

We quote from Vol. 1 of Rorer on Railroads, pages 9 and 10, as follows:

"LEGAL STATUS OF RAILROADS AS PROPERTY.—Whether we regard the structures of railroads which are permanent fixtures upon the soil, and their rolling stock and required appliances for operating them, as an entirety, or not, yet according to the most approved definition, the roadbeds, ties, rails, turnouts, depots, depot-houses or station-houses, water-tanks, and all other fixtures, come within the definition of real property, and are to be regarded as such; for lands comprehend all things of a permanent and substantial nature, and things real usually consist of lands, tenements or hereditaments. Thus real property or lands legally include all houses and other buildings and structures thereon erected or situated.

* * * * * *

"There is no doubt about the road structure itself, and permanent erections, houses and attachments, being real property."

Judge Elliot in his recent work on Railroads, Vol. 1, paragraph 31, states the proposition as follows:

"RAILROADS AS PROPERTY.—All property essential to the operation of a railroad, including the right of way, roadbed, ties, rails, side tracks, switches, depots, station houses, water tanks, and other fixtures, together with the rolling stock and other necessary movable appliances, has been held by the Federal Courts to be real estate. The same ruling is made by the Courts of many States, in some of which the character of rolling stock as property is fixed by statute. In those States in which the subject is uncontrolled by statute, the preponderance of authority is to the effect that only the land owned by the railroad company, together with the ties, rails and other structures permanently affixed thereto, is realty; and that engines, cars and other movable appliances are to be regarded for most purposes as personalty."

This Court in the case of *Galveston Railroad vs. Cowdry*, 11 Wall., 459, had occasion to consider the character of the permanent structure of a railroad which is affixed to the realty, and, speaking through Justice BRADLEY, states the proposition as follows:

"By the common law it is an inflexible rule that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the

question here. The rails put down on the company's road become a part of the road."

In the case of the *United States vs. The New Orleans R. R.* (12 Wall., 362), this Court, speaking through Justice BRADLEY, uses the following language in respect to this question:

"Had the property sold by the government to the railroad company been rails, as in the case of *Galveston Railroad vs. Cowdrey*, or any other material which became affixed to and a part of the principal thing, the result would have been different."

Porter vs. Pittsburg Bessemer Steel Co. (120 U. S., 649) was a case in which a mortgage upon a railroad had been foreclosed in the court below, but the Court, in its decree of foreclosure, determined that certain other claims, among them the claim of the Smith Bridge Company, were liens prior to the mortgage, and the mortgage was subject to these liens. This Court in that case reversed the decision of the Court below in so far as its decree determined that these claims were liens on the railroad property prior to that of the mortgage foreclosed. Upon the case again being brought before this Court, upon a petition for a rehearing (*Porter vs. Pittsburg Bessemer Steel Co.*, 122 U. S., 267), the Smith Bridge Company insisted that its claim, being for bridges conditionally sold to the railroad company, under agreement that the bridge company should remain the owner of the bridges until the contract price was fully paid, the placing of the bridges in the roadbed of the railroad company did not divest the bridge company of the title, and that the title still remained in the bridge company, and, consequently, the mortgage became a lien on the bridges only as the bridges became the rightful and legal property of the railroad company. The Court, answering that contention, speaking through Justice BLATCHFORD, says:

"The bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges, or upon the railroad outside of the bridges. Whatever is the

rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company covering after-acquired property, it is well settled in the decisions of this Court that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held, by the lien of such mortgage, in favor of *bona fide* creditors as against any contract between the furnisher of the property and the railroad company containing stipulations like those in the contracts in the present case (*Dunning vs. Railway Co.*, 1 Wall., 254; *Galveston R. R. Co. vs. Cowdrey*, 11 Wall., 459, 480, 482; *U. S. vs. New Orleans R. R.*, 12 Wall., 362, 365; *Dillon vs. Barnard*, 21 Wall., 430, 440; *Fosdick vs. Schall*, 99 U. S., 235, 251)."

In the case of *Thompson et al. vs. The White Water Valley Railroad Company et al.*, 132 U. S., 68, this Court, in the 4th point of the syllabus, states the proposition contended for as follows:

"Rails put down upon the company's road and permanent fixtures which are essential to its successful operation become a part of the property of the company—as much so as if they had existed when the mortgage was executed."

In the case of *Joy et al. vs. City of St. Louis*, 138 U. S., 1, this Court, in determining the character of the superstructure placed on the right of way, says (a case almost decisive of this):

"The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way."

Justice BREWER, in the case of *Keener et al. vs. Union Pacific Railroad*, 31 Federal, 128, defines the words "right of way" as follows:

"The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross; a right of crossing; a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed. Ob-

viously, the term in the statute in this case has the latter significance, and taxation is to be upon that strip, assessed at its full cash value, which the railroad company has appropriated and is using as its right of way, and upon which, to its entire width, it may place its tracks and side tracks; therefore, by the very terms of the statute, this right of way—this strip—thus occupied by the railroad company for now eighteen years, has been taxed to the railroad company, and these taxes have been paid by it."

When railroads came into existence and the right of eminent domain was conferred upon them it was found that many existing legal terms were applicable to railroads. Among such terms is this term "right of way," which has been universally adopted by legislatures and railroads themselves as a generic phrase to designate in any give case a certain, definite and and fixed amount of land held exclusively for the use of a railroad company and upon which its permanent structures are located for the operation of its road. A very interesting history of the early conception of railroads in this country and of their relation to the public with respect to their "right of way," etc., is found in the opinion of Mr. Justice BRADLEY in the case of *Lake Superior R. R. vs. U. S.* (93 U. S., 442), from which we quote as follows (the italics are ours):

"Be this, however, as it may, the general course of legislation referred to sufficiently demonstrates the fact that in the early history of railroads it was quite generally supposed that they could be public highways in fact as well as in name. This view pervaded the language of most charters granted at that period, many of which still remain in force, and the railroads constructed under them are theoretically, at least, public highways to this day. This fact affords the only explanation of much of the language used, not only in those early charters, but in many of those which have been granted since, the latter adopting, as was natural, *the forms of phraseology found prepared to hand.* The forms of legislative expression thus adopted and coming down from a period when they had greater *practical significance* than they now have, bring with them an established sense which renders them free from all uncertainty and doubt. We know as well as we know the sense of any phrase in the English language which has a historical meaning and application what is meant when a railroad is spoken of, i n

a law, as a 'public highway.' We know that it refers to the immovable structure stretching across the country, graded and railed for the use of the locomotive and its train of cars."

In the case of *Palmer vs. Forbes et al.*, 23 Ill., 300, the Court, in speaking through Chief-Justice CATON, uses the following language:

"The railroad itself, including the ground and superstructure, as well as the depot grounds, buildings and turntables, and the like, are real estate, no doubt has ever been expressed, but it is denied that the rolling stock and other property, capable of being removed from the road without breaking the soil or leaving a trace of the removal, is to be treated as a part of the road itself, and pertaining to the real estate.

"We are of the opinion that the rolling stock, rails, ties, chairs, spikes and all other material brought upon the ground of the company incumbered by the mortgage, and designed to be attached to the realty, should be considered as a part of the realty, and incumbered by the mortgage as such."

In *Hunt vs. B. S. I. Co. et al.*, 97 Mass., p. 279, FOSTER, J., says:

"There can be no doubt that the rails, when laid upon a roadbed and fastened there so that engines and cars could pass over them, would have become annexed to the realty and ceased to be personal property, in the absence of any agreement changing the ordinary rule of law. * * * Our own adjudged cases fully support the position that rails, when laid, become a part of the realty in the absence of any agreement to the contrary."

See, also,

Pierce vs. Emery, 32 N. H., 484; and

In the case of *Bank vs. Anderson et al.* (75 Va., 250) the Court of Appeals of Virginia determined that old rails, severed from the soil to which they were attached, on account of their unfitness for further use, changed, upon such severance from the real estate, to personal property.

In the important and leading case of Milhau vs. Sharp, 27 N. Y., 620, the Court of Appeals in New York was considering the effect of a grant by the corporate authorities of New York

City to a corporation to build a street railroad upon one of its streets without limitation as to time, etc., and the Court held that the ordinance was void because of the fact that upon building the road it would become permanently attached to and a part of the fee which the city authorities would thereby surrender the right to use for a public street, the Court saying:

"The rails when laid would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. * * * The title of the rails, when permanently attached to the land, and such right in the land as may be requisite for their maintenance are therein granted to the defendants by ordinance."

In the case of the People *ex rel.* vs. Cassity, 46 N. Y., 46, it was claimed that three miles and a half of railroad owned by a corporation was personal property, and could not be taxed as real estate, but the Court held that the taxing officers had a right to tax the real estate upon which the superstructure was laid, and that necessarily the superstructure was included in such taxation as real estate. In the case of the City of New Haven vs. F. & W. R. R. Company, 38 Conn., 422, it was contended that the superstructure of a street railroad, attached to the street, and the interest to which it was attached, were insufficient interest in land to be assessed, for benefit of street improvements, but the Court decided against the proposition, saying:

"The rails, sleepers, ties and spikes of the horse railroad company, so laid into and attached to the soil of the street as to become a part of the realty, were real estate."

In the case of the North Beach and Mission Railroad Company, 32 Calif., 499, there was an attempt, by a street railroad company, of San Francisco, to evade payment of a portion of the cost of widening the street upon which the railroad was operated, upon the theory that only the owners of the soil could be assessed for benefits growing out of the widening of

the street. In an extremely able review of the authorities relating to easements, etc., Justice SAWYER, delivering the opinion of the Court, summed the matter up as follows:

"Thus it appears that the appellant has acquired an interest in the soil in Kearny street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose, in the mode prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement became themselves a part of the land—of the estate of the company—and that, in those States where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate in the same manner and upon the same principles, and as land—as if the company owned the land itself upon which the track is laid to the extent of its interest in it. The interest is local—fixed to the particular land, the particular street—and cannot be enjoyed beyond or independent of that fixed locality. It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other; and the right of the street railroad company to the exclusive control and enjoyment of its estate in the soil of the street to the full extent of that estate is as perfect as the right of the lessee or owner of the lot fronting on the same street to control and enjoy his estate. The several estates are substantially the same kind and are of equal dignity before the law, but one is larger, more extensive, than the other. Practically, they differ only in the quantity of interest, not in quality."

In the case of the *Chicago & Alton R. Co. vs. Dennison, etc.*, 98 Ills., 350, the Supreme Court of Illinois held that thirty-two acres of land in the vicinity of Bloomington, covered with tracks, cars, shops, machine shops, blacksmith shops, foundry, roundhouses, freight depot, stock yards, paint shops, etc., were a part of the right of way of the Chicago and Alton Railroad Company, for the purpose of taxation, although there was nothing in the statute that required or provided that such grounds should be so included in such words.

The Supreme Court of Indiana, in the case of *Pfaff, Auli-*

tor, etc., vs. Terre Haute & I. R. Co. (108 Ind., 144), followed the decision of the Supreme Court of Illinois, upon a careful review of all the authorities. Practically the same decision was made by the Supreme Court of North Dakota in a very recent case, being the case of *C., M. & St. P. R. Co. vs. Cass County*, 76 N. W. Rep., 239.

See, also, to the same affect, *State vs. N. J. R. R.*, 35 N. J. Law, 537, and the recent case decided by the Supreme Court of Pennsylvania, in January of this year, of *W. N. Y. & P. R. Co. vs. Venango et al.*, reported in 38 Atl. Rep., 1088.

II.

It is perfectly clear, from the provisions of the Act, that Congress intended that the railroad, which was to be built upon the "right of way" provided for, should be permanent, and for all time, and that it was not to be in the nature of a mere "*trade fixture.*" If the superstructure, placed upon this "right of way" to make a completed railroad, is a permanent fixture that has become a part of the estate, it is difficult to understand the claim that, for the purposes of assessment and taxation, it can be segregated from the balance of the estate, which it is a part of, without express authority from Congress.

III.

This Court, at a very early day in railroad history, in the case of *York & Maryland Line R. Co. vs. Winans* (17 How., 30), speaking through CAMPBELL, J., stated a principle of law concerning the rights and duties of railroad companies, which is now elementary. Justice CAMPBELL, in speaking of the duties and obligations of a railroad company to the sovereignty creating it, says:

"Important franchises were conferred upon the corporation to enable it to provide the facilities of communication and intercourse required for the public convenience. Corporate

management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature *(Beman vs. Rufford*, 1 Simon, N. S., 550; *Winch vs. B. and L. Railway Company*, 13 L. & E., 506*)*."

This statement of Justice CAMPBELL has been often quoted with approval by this Court.

Thomas vs. R. R. Co., 101 U. S., 83.
P. A. R. R. Co. vs. St. Louis, etc., R. Co., 118 U. S., 308.
O. R. & N. Co. vs. O. R. R. Co., 130 U. S., 27.
Central Transportation Co. vs. Pullman's Palace Car Co., 139 U. S., 40.
J. M. P. R. & N. Co. vs. Hooper, 160 U. S., 524.

The principle involved in the quotation from Justice CAMPBELL'S opinion, which has been so thoroughly affirmed by this Court, has been carried to its logical conclusion that a railroad company has no right to discharge itself from performing its duties to the public by removal of the superstructure placed upon its right of way without the express consent of the Government. A very clear statement is made by Justice ALLEN of this proposition, in speaking for the Supreme Court of Kansas, in the case of *The State ex rel. vs. D. C. M. & T. R. Co.*, 53 Kansas, 377. We quote from Justice ALLEN'S opinion, as follows:

"While the title to a completed railroad is vested in the corporation, it is only private property in a qualified sense. Railroads, like all other public thoroughfares, are public instrumentalities. The power to construct and maintain railroads is granted to corporations for a public purpose. The right to exercise the very high attributes of sovereignty, the power of eminent domain and of taxation, to further the construction of railways, could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the roadbed, superstructure and

other permanent property of the corporation are devoted to the public use. From this use, neither the corporation itself, nor any person, company or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the state. It matters not whether the enterprise as an investment be profitable or unprofitable, the property may not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanction, railroads could not be constructed. When once constructed, they may only be destroyed with the sanction of the state. The legislature unquestionably has the power to authorize the abandonment of railroads when they cease to be of public utility. * * * The general propositions stated above are abundantly supported by authority: *E. & N. E. Rld. Co. vs. Casey*, 26 Pa., 287; *The State vs. S. C. & T. Rld. Co.*, 7 Neb., 357; *People vs. L. & N. Rld. Co.*, 10 N. E. Rep. (Ill.), 657; *Railroad Commrs. vs. P. & O. C. Rld. Co.*, 63 Me., 269; *Railway Co. vs. Mining Co.*, 68 Ill., 489; *Gates vs. Railroad Co.*, 53 Conn., 333; *Thomas vs. Railroad Co.*, 101 U. S., 71; *Railroad Co. vs. Winans*, 17 How., 30; *Pierce vs. Emery*, 32 N. H., 484; *People vs. N. Y. C. & H. R. Rld. Co.*, 28 Hun, 543.

" These views are also in accordance with prior decisions of this court: *Commrs. of Leavenworth Co. vs. Miller*, 7 Kas., 479; *St. J. & D. Rld. Co. vs. Ryan*, 11 *Id.*, 603; *The State ex rel. vs. Bridge Co.*, 22 *Id.*, 438; *City of Potwin Place vs. Topeka Rly. Co.*, 51 *Id.*, 609.

" A railroad is a public highway and none the less so because constructed through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public " (Smith vs. Ames, 169 U. S., 466).

It is quite clear that the " right of way " granted and acquired by the Atlantic and Pacific Railroad Company in the Territory of New Mexico, upon receiving its permanent superstructure, became so impressed with the public uses and purposes expressed in the act under consideration that neither the Atlantic and Pacific Railroad Company, nor any one claiming under it, has the right to remove from its " right of way " any such portion of it as would prevent the Atlantic and Pacific Railroad Company, or its successors, from operating it for the

purposes of its creation, or prevent the Government from using the line under the 11th section.

The completed portion of the railroad of the Atlantic and Pacific Company in New Mexico is, in a very large sense, a public highway, which the Government of the United States has the right to use, as a postal and military route, upon such terms as Congress may, at any time, see fit to impose.

In view of the public character of this railroad, it is hardly possible to believe that Congress intended that the permanent superstructure upon the "right of way" should, for any purpose, be severable from such "right of way," as "trade fixtures are severable," and be treated as the personal property of the railroad company, separate and distinct from the estate to which it is affixed.

THIRD POINT.

Congress intended that the right of way of the Atlantic and Pacific Company which was provided for in the act under consideration should be an estate in fee simple.

I.

The estate which the Atlantic and Pacific Railroad Company acquired as "right of way" under the provisions of the act being of such a character as to absorb any permanent fixtures attached to it, it is a matter of very little importance whether such estate be technically an easement or an estate in fee, and we should not discuss this question were it not that counsel for appellant states in his brief that appellees place their claim of the exemption of the superstructure upon the sole ground that this estate is an estate in fee, while, as

counsel proceeds to argue, it is less than a fee—in fact, an easement of so low an order and character that fixtures attached to the property are not included in the estate of the Railroad Company. Counsel for appellant is mistaken in this assumption that we now claim, or in the past, have claimed it to be at all essential to establish the proposition that the "right of way" provided for, vested an estate in fee simple, in the company. We believe, however, that the "right of way" granted by the second section and the "right of way" to be obtained under the provisions of the seventh section are when vested in the company, estates in fee simple.

In the case of the *Missouri, Kansas & Texas R. Co. vs. Roberts*, 152 U. S., 114, this Court, in determining the character of an estate vested in a railroad company by a grant of a "right of way" contained in the Act of July 27, 1866 (14 Stat., 289), determined that the "right of way" granted was an estate in fee simple. The words constituting the grant of the "right of way" under consideration in that case are found in the proviso, contained in the first section of the act, which reads as follows:

"*Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the president of the United States."

It is true, as claimed by appellant, the Circuit Court of the United States for the Southern District of California, in the case of the *Mercantile Trust Company vs. Atlantic & Pacific Railroad Company* (63 Fed. Rep., 913) determined that the decision of this Court in the Roberts case, that the title granted was a fee, was mere *dictum*. This decision of the Circuit Court resulted from the overlooking by the learned Judge who de-

livered the opinion of the fact that the Roberts case was tried in the State Courts in Kansas, and that, under the Kansas Code, actions of ejectment can be brought for the purpose of determining title to real estate, which, whenever it is in controversy, can be absolutely determined in such an action.

A. T. & S. F. vs. Pracht, 30 Kas., 66.
Bancroft vs. Chambers, 10 Kas., 364.
Blanchard vs. Brown, 3 Wall., 245.
Sturdy et al. vs. Jackway et al., 4 Wall., 174.

The Roberts case discloses that the action was brought and tried for the express purpose of determining the title to the "right of way" involved, and that, therefore, the decision of this Court upon that question can, by no possibility, be considered *dictum*.

The Supreme Court of the State of California in the case of the *Southern Pacific R. R. Co. vs. Burr*, 86 Cal., 279, had occasion, in *banc*, to determine the character of the estate granted by the second section of the Act of Congress of July 1, 1862 (12 Stat., 489). The grant of the right of way contained in the act construed by the California Court is practically the same as the one under consideration. The second point in the syllabus of the case referred to reads as follows:

"The act of Congress of July 1, 1862, granting to the Central Pacific Railroad Company a right of way two hundred feet in width on each side of its road, did not grant a mere easement for the construction and operation of its road, but operated as a special grant of land, and is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and gave to the grantee the exclusive right to the possession of all the land embraced in the grant of such right of way; and the railroad company may maintain an action of ejectment to recover possession of the whole of the four hundred feet so granted, although only occupying a small portion thereof for its roadbed."

The Supreme Court of Illinois in the case of *Wiggins Ferry Company vs. Ohio and Mississippi Railway Company*, 94 Ill.,

83, in considering a "right of way" granted by deed upon conditions subsequent, held that the way granted was a base or qualified fee.

The Supreme Court of New Jersey in the case of *N. Y. S. & W. R. R. Co. vs. Trimmer*, 53 N. J. L., 1, determined that the estate acquired by a railroad company as "right of way" is greater than an easement, and that it is a misnomer to call it an easement.

If Congress intended that the estate to be acquired as right of way should be less than a fee, it undoubtedly intended that it should be a greater interest in the land than that of a mere common law easement.

The Supreme Court of Iowa, in the recent case of *Smith et al. vs. Hall et al.*, reported in 72 N. W. Rep., 427, in speaking of the character of the estate acquired by a railroad as a right of way, uses the following language:

"The easement is not that spoken of in the old law books' but is peculiar to the use of a railroad, which is usually a permanent, perpetual highway of travel and commerce, and will rarely be abandoned by non-user. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easement will be perpetual; so that, ordinarily, the fee is of little or no value unless the land is underlaid by quarry or mine (*Hollingsworth vs. Railroad Co.*, 63 Iowa, 443, 19 N. W., 325; *Cummins vs. Railroad Co.*, 63 Iowa, 397, 19 N. W., 268; *Clayton vs. Railroad Co.*, 67 Iowa, 238, 25 N. W., 150). The nature and quality of the interest taken and conferred is necessarily limited and fixed by the legislature and whether only an easement or a full fee title is purely for its determination."

K. C. R. R., vs. Allen, 22 Kas., 285.
Hazine vs. R. R. Co., 3 Gray, 560.

It is plain that Congress intended to give to the railroad company the same character of title to the "right of way" granted over the public domain as it intended the company to acquire, by condemnation proceeding under the seventh section, where it is stated that, upon completion of such condemnation proceedings, the company shall "*acquire full title to the same for the purposes aforesaid.*" It must be true that the

company acquired in its "right of way" obtained under either section of the act such an estate in the soil, as made the railroad, machine shops and other buildings, and permanent fixtures attached thereto an inseparable part of it.

The moment the line of definite location was made by the Atlantic and Pacific Railroad Company through the Territory of New Mexico, an estate in fee in the land included in the "right of way" granted by the second section of the act was vested in the company, subject only to forfeiture by the Government of the United States on happening of the conditions subsequent.

Railroad Co. vs. Alling, 99 U. S., 463.
Railroad Co. vs. Baldwin, 103 U. S., 428.
Bypee vs. O. & C. R. R. Co., 139 U. S., 663.
Noble vs. Union River Logging Co., 147 U. S., 165.
N. P. R. R. Co. vs. Smith, 171 U. S., 260.

In *Noble vs. Union River Logging Co.*, 147 U. S., 165, this Court, in construing the right of way Act of 1875, says:

"The language of that section is, 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in præsenti of lands to be thereafter identified*, (*Railway Co. vs. Alling*, 99 U. S., 463). The railroad company became at once vested *with a right of property in these lands*, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained (*Moffat vs. U. S.*, 112 U. S., 24, 5 Sup. Ct. Rep., 10; *U. S. vs. Minor*, 114 U. S., 233, 5 Sup. Ct. Rep., 836)."

FOURTH POINT.

The grant of exemption from taxation of the "right of way" contained in the second section of the act exempted all improvements that Congress intended should be placed upon such right of way for the purpose of building and operating the railroad contemplated by the act.

I.

In the case of the Appeal Tax Court of Baltimore City vs. the Baltimore Cemetery Company, 50 Md., 432, a question of this kind was considered. The defendant cemetery company's charter provided that "the land of the company dedicated to the purposes of a cemetery shall not be subject to taxation of any kind."

The assessors assessed for taxation the permanent improvements, claiming authority under an act requiring assessors, in valuing real estate, to estimate the value of the land per acre, and "separately to value the improvements thereon."

The Court says :

"The whole contract shows that the permanent improvements are treated as realty, as the law regards them, *and in our judgment the exemption of the lands from taxation necessarily embraces also an exemption of the permanent improvements thereon,* used for the purposes of a public cemetery, and which are essential to the use and enjoyment of the land for the purposes contemplated in the charter."

In Osborne vs. Humphrey, 7 Conn., 335, a tract of land owned by an ecclesiastical society had been demised by it to certain parties for nine hundred and ninety-nine years. The State sought to collect taxes on the property, or, if the lands were held to be exempt under the act exempting the property of ecclesiastical societies, on the buildings which had been erected by the lessees. The Court, on page 339, says :

" It is emphatically asked why should not the plaintiff be taxed to the extent of his buildings ? My answer is, *the buildings are attached to the land, which the legislature, having the power and the right, have been pleased to exempt from taxation for the public good.*"

In Parker vs. Redfield, 10 Conn., 490, an ecclesiastical society divided its land into building lots, and leased the lots to parties for various terms. One of these lessees was taxed for a building on the land. The agreement in the lease was that the lessee should have the right to remove the buildings at the end of his term, and the Court held that in consequence of this the building was personalty, did not become a part of the realty, and was not exempt with the realty. The Court says:

" It is readily conceded that had the Episcopal Society improved the lands granted to them by erecting buildings thereon, or in any other manner the improvements so put on, would not either in their hands, or the hands of their lessees, have been liable to taxation. They would have constituted a part of the land and would, therefore, have been exempted within the provisions of the statute.

" So, also, had they leased the lands for a term of 999 years, and buildings had been erected thereon by their lessees, the case would have fallen within the principle of Osborne vs. Humphrey ; and the buildings as well as the land would have been exempted, and for the same reason, viz.—that they were a part of the land."

In Lehigh Coal and Navigation Co. vs. Northampton County, 8 W. & S., 334, it was held that the bed, berm-bank, tow-path, toll houses and collectors' offices of a canal formed part of the canal itself, and were, consequently, exempt from local taxation.

Schuylkill Navigation Co. vs. Berks County, 11 Pa. St., 202.

An exemption from taxation of property necessarily used in operating a railroad was held to apply to an inn used exclusively by persons arriving and departing on the train.

Milwaukee, etc., R. R. Co. vs. Crawford Co., 48 Wis., 666.

The exemption of all machines, vehicles or carriages belonging to a railway company, with all their works, was held to exempt its real estate, as well as its rolling stock.

Richmond vs. D. R. R. Co., 21 Grat., 604.

Mayor, etc., of Baltimore vs. B. & O. R. R. Co., 6 Gill, 288.

A provision that a certain tax on the capital and debts of railroad companies should take the place of all other taxes on railroads and horse railroad property and franchises was held to exempt property whether used for railroad purposes or not.

See Osborne vs. N. Y. & N. H. R. R. Co., 40 Conn., 491.

In North Carolina the charter of a railroad company provided among other things that:

"All the real estate held by the company for right of way, for station places of whatever kind, and for work shop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum."

A question arising as to the true construction of this provision of the charter was ably considered by the Supreme Court of North Carolina in the case of R. & D. R. R. Co. vs. Alamance, 84 N. C., 504.

The taxing authorities undertook to assess a lot occupied by the company, upon which was constructed an office building used by the officers of the company, there also being on the same property the post-office and two buildings occupied by private persons as stores and warehouses, also the machinery in the workshops.

The Supreme Court held that the lot was clearly exempt from taxation, as also the machinery, and says:

"It is manifest that the erection of workshops, such as those put upon the land of the company, were in contemplation of the Legislature when the act was passed, and a fair and reasonable construction of the language will take in the machinery and its accessories to be operated in the workshop.

Of what use is the naked building or land without these fixtures and implements in accomplishing any benefit to the road? And why should the one and not the other, so intimately associated for a common purpose, be relieved from the burden?"

"We do not enter into the niceties and technical distinctions in reference to what are and are not fixtures, and pass with the land in controversies between landlord and tenant, vendor and vendee, and others, but looking to the broader purpose of exemption in inviting the investment of capital in a great self-supporting enterprise for the improvement of the State, in connection with the large contribution of the State itself to ensure its completion, we cannot separate the building from the machinery and necessary adjuncts within in giving effect to the provision for exemption, and in our opinion all are protected alike. The cases cited in the brief are but in confirmation of this view."

Makepeace, *ex parte*, 9 Ired., 91.
Bryan vs. Lawrence, 5 Jones, 337.
Latham vs. Blakely, 70 N. C., 368.
Bond vs. Coke, 71 N. C., 97.
Deal vs. Palmer, 72 N. C., 582.
Moore vs. Valentine, 77 N. C., 188.

See, to the same effect, The Schuylkill Navigation Co. vs. The Commissioners of Berks Co., 11 Pa. St., 202, and Railroad vs. Berks, 6 Pa. St., 70.

This Court cited approvingly some of these decisions, in the case of United States vs. Denver, &c., Railway Company, 150 U. S., 13, where it is stated in the opinion:

"Again, exemption from taxation is construed with greater strictness in favor of the State than grants of public property or rights, for the reason that taxation is more essential to the existence of government than ownership and possession of public property. Yet it has been held in several well-considered cases that where a railroad is exempt from taxation such exemption extends to structures like those in question. Thus, in the case of the Lehigh Coal and Navigation Co. vs. Northampton County, 8 W. & S., 334, it was held that as an incorporated canal was not taxable, not only the bed, berm-bank and tow-path of the canal, but the *lock houses* and *collectors' houses*, were also exempt, these being considered constitutent parts of the canal or *necessarily incident thereto*. So in Railroad Co. vs. Berks County, 6 Penn., St., 70, it was held that as the railroad was exempt from taxation, water stations and depots, including the offices and places to hold cars, &c., *being*

necessary and indispensable to the construction and use of the road, were within the exemption, while warehouses and coal lots, intended for the mere convenience of the road, were not so exempt. The principle of these cases is followed and illustrated in the case of State vs. Commissioners, 3 Zabr. (23 N. J. L.), 510, and in the case of Worcester vs. Western Railroad, 4 Met. (Mass.), 564."

In Inhabitants of Worcester vs. The Western Railroad Corporation, 4 Met., 564, above cited, it was contended "that although the mere franchise or right of way along the strip of land appropriated to the track of the railroad may be exempted from taxation, yet that the real estate, consisting of buildings and other structures connected with it is not entitled to the same exemption." But the Court, speaking by Chief-Justice SHAW, held that the exemption extended to the buildings, using the following language:

"The Court are therefore of the opinion that this railroad corporation is not liable to taxation, for the land of the width of five rods, located for the road, nor for any buildings or structures erected thereon, so that they be reasonably incident to the support of the railroad, or to its proper and convenient use for the carriage of passengers and the transportation of commodities; and that this includes engine and car houses, depots for the accomodation of passengers, and warehouses for the convenient reception, preservation and delivery of merchandise and all goods and articles carried on the road."

Is it not reasonably clear upon authority that an exemption of "right of way" includes such permanent structures as may be placed thereon in the construction of a railroad?

It will be conceded that where improvements of this character are placed upon land with the intent of all parties that they shall be removed by the owner a different rule applies.

Wiggins Ferry Co. vs. Railway Co., 142 U. S., 396.

Congress having exempted the right of way, or real estate, from taxation, we submit that, within the rule of the foregoing authorities, the superstructure is also exempt.

In this connection we call attention to the very able

opinion of Chief-Justice SMITH delivered in this case in the Court below (Le Cose 106, pp. 69 to 79).

We also call special attention to the decision of the Supreme Court of Montana (N. P. R. R. Co. vs. Carland, 5 Mont. 146), upon this very question, where it was sought, as in the case at bar, to assess and tax a portion of the superstructure of the Northern Pacific Railroad Company, the charter of which contains the same exemption.

FIFTH POINT.

If the question of the scope of this exemption be at all doubtful, the practical construction placed upon it, by the Territory and its officers charged with the execution of the revenue laws, ought to receive great weight, if it be not controlling, so far as this Territory is concerned.

In view of the fact that the Legislature of New Mexico has never attempted, in any manner, to provide a method or means of assessing the property sought and attempted to be assessed in the case at bar separate and distinct from the real estate to which it was and is attached, and in view of the further fact that this property has never paid any taxes during its existence, it seems very clear that the Territory of New Mexico, so far as the enactment of any laws is concerned, or so far as its various Legislatures are concerned, has never sought or intended to have this property taxed, but has, by its acquiescence and its inaction admitted that without permissive legislation it has no right to tax the same.

What is the legal effect of the practical construction thus placed upon the charter of the railroad company and upon the

territorial revenue laws by the officers charged with their execution? It is not claimed that the practical construction placed upon a statute by the officials charged with its enforcement can override its plain and obvious meaning, or should be resorted to when there is no ambiguity or obscurity, But where doubt exists as to the construction or meaning of a statute, the Courts will construe it in the same manner as it has been construed during a series of years by the officers who are responsible for its enforcement.

In *United States vs. Union Pacific Railway Company*, 148 U. S., 562, 572, it is said:

"If there were any doubts with regards to the interpretation of the Act of 1869, the construction placed upon it by the law department for eighteen years, under which construction these lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight."

Again, it is said in *United States vs. Tanner*, 147 U. S. 663:

"If it were a question of doubt, the construction given to this clause prior to October, 1885, might be *decisive;* but as it is clear to us that this construction was erroneous, we think it not too late to overrule it. It is only in case of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material."

"Great weight," said Chief-Justice MARSHALL, in *Cohens vs. Virginia*, 6 Wheat., 418, "has always been attached, and very rightly attached, to contemporaneous exposition."

In re Washington, 115 N. Y., 442, 447, PECKHAM, J., said:

"Such acquiescence and recognition on the part of the officers of the government are of very considerable, if not of controlling, weight in the interpretation of a general act of the legislature relating to public objects like the one under consideration. *Euston vs. Pickersgill*, 55 N. Y., 310; *People vs Dayton, Id.*, 367."

In *Commonwealth vs. Mann*, 168 Pa. St., 290, it is held that "in construing a statute, the construction placed upon it for twenty years from the time it became a law, by those whose

duty it was to construe it, and who were affected by it, is proper for consideration."

In *United States vs. Pugh*, 99 U. S., 265, 269, it is said:

"It is a familiar rule of interpretation that in the case of doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

Clark's Run & Road Co. vs. Commonwealth, 29 S. W., 360.
Edward's Lessee vs. Darby, 12 Wheat, 210.
In re Board of Street Opening, 33 N. Y., 594.
Endlich on statutes, Sec. 357.
23 Am. & Eng. Encycl. Law, p. 339.

Surely great importance should be attached to the fact that for the fourteen years of the operation of the Atlantic and Pacific Railroad, a practical construction was placed upon its charter and upon the revenue laws of New Mexico in exact accordance with the claim of exemption now made. In case of doubtful meaning such construction should be decisive; and before the Territory can overthrow the established course of procedure and the acquiescence for so many years in the belief that the taxes here sued for were not properly assessable, it must show that its claim is perfectly clear and entirely free from doubt.

SIXTH POINT.

There is no provision in the laws of the Territory of New Mexico authorizing the segregation of the superstructure from the right of way of any railroad for purposes of assessment or taxation, and, therefore, the assessments in question were void.

Regardless of the question as to whether or not, under the Act of Congress, the Territory of New Mexico, or any of its legal subdivisions, had the right to assess, for the purpose of taxation, the superstructure of the Atlantic and Pacific Railroad Company permanently attached to its "right of way," neither of these counties, under the revenue laws of the Territory, had any power or authority to separate this superstructure from the "right of way," in order to assess it for taxation, separate and distinct from the real estate to which it is attached.

In other words, the only way in which this property could be legally assessed under the laws of New Mexico, regardless of the question of exemption under the Act of Congress, would be to assess the superstructure and the "right of way" as one complete and entire thing and as real estate.

The statutes of New Mexico applicable to this question are Sections 2807, 2822, 2834 and 2835 of the Compiled Laws of 1884, and read as follows :

"2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined :

"*First.* The term 'real estate' includes all lands within the territory to which title or right to title has been acquired ; all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto and improvements.

"*Second.* The term 'improvements' includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired to said land or not.

"*Third.* The term 'personal property' includes everything which is subject of ownership, not included within the term 'real estate.'

"*Fourth.* The term 'credit' includes every claim and demand for money, or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries, or payments expected for services to be rendered are not included in the above term.

"2822. The assessor is required, between the first day in March and the first day in May of each year to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation. To this end he shall visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately.

"*First.* All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

"*Second.* The county in which such property is situated, or in which it is liable to taxation.

"*Third.* A description by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewelry, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail."

"2834. On on before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headlines, alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value as hereinbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll all property assessed to 'unknown owners' shall be entered.

"2835. Each tract of land shall be valued and assessed separately except when one or more adjoining tracts are returned by the same person, in which case the may be valued and assessed together."

It will be seen that the first subdivision of Section 2807, as applied to this matter, reads as follows: "The term 'real estate,' includes * * * all rights and privileges appertaining thereto and improvements." This, with the provisions of the second subdivision, that the term "improvements" includes everything erected upon or affixed to land, clearly shows that, under the statutes of New Mexico, the superstructure and the "right of way" to which the superstructure of this railroad is affixed, should be assessed, if at all, as one thing, and as real estate, to be described in the manner required by the third subdivision of Section 2822 and Section 2835. No power is given to separate the improvements affixed to any interest in land from that interest, as such interest, whatever it may be, and the improvements attached to it are one therewith and inseparable therefrom. Counsel for appellant has cited a number of cases going to the proposition that possessory interests in real estate are taxable (a proposition not denied), and he has also cited a California case, showing that improvements are to be assessed separate from the realty. Section 2 of Article 13 of the Constitution of California, which went into effect May 7, 1879, provides that "lands and the improvements thereon shall be separately assessed." Of course, under this provision, all improvements on real estate in California are assessed separately from the land, but under the statutes of New Mexico, the improvements and lands are included in the interest in lands, which is to be assessed as one thing. It will be conceded that a valid assessment is an essential prerequisite to a valid tax levy.

County of Santa Clara vs. S. P. R. Co., 118 U. S., 394.

People vs. C. P. R. R. Co., 127 U. S., 1.

Therefore, if under the revenue law of New Mexico, improvements permanently affixed to an estate in land cannot be separated from such estate by the taxing officers for the purposes of assessment, these assessments, made in this case,

were absolutely illegal, regardless of the question of exemption. It is no argument against the proposition that the segregation of these improvements, for the purposes of assessment, was rendered necessary by the exemption of the estate to which they were attached; if a law could be passed which would permit the segregation of the same for such purposes it is a matter for the Legislature of New Mexico, or Congress, to act upon, and not for this Court to consider on this argument.

SEVENTH POINT.

The burden is upon the Territory to make it clearly appear that it has the right to assess for the purpose of taxation a part of an estate which Congress has declared exempt in such Territory from taxation either by Congress or the Territory.

I.

It will be conceded that the Territory of New Mexico is a mere municipal corporation of the United States, and that Congress has absolute and complete control thereover, having the right to enact such laws relative to the rights of the Territory, and of its people as it may see fit to do, within its constitutional limitations.

National Bank vs. County of Yankton, 101 U. S., 133.
Clayton vs. People, 132 U. S., 632.
Latter Day Saints vs. United States, 136 U. S., 1.

At the time Congress passed the act under consideration (and since then) the following provisions of the Revised Statutes of the United States were and have been in full force and effect :

"SEC. 1850. All laws passed by the legislative assembly and governor of any territory, except in the territories of Colorado, Dakota, Idaho, Montana and Wyoming, shall be submitted to Congress, and, if disapproved, shall be null and of no effect."

"SEC. 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

"SEC. 1891. The constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."

The Territory of New Mexico did not grant to the Atlantic and Pacific Railroad Company the exemption which is claimed. Whatever the rule might be, if this was a question of the right of the United States to tax this superstructure for its own benefit, such rule would not be applicable to the Territory of New Mexico.

We quote from the opinion of Chief-Justice SMITH in this case as follows:

"It is true that the exemption from taxation by a state is construed with strictnesss in favor of a state, but it will be observed that this discrimination exists where the exemption is the act of the state as to the property within its jurisdiction, not a privilege derived from the general government for the benefit and welfare of the public in the territory belonging to the United States. The Atlantic and Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent and benefits conferred upon one by the other, and it is not, we conceive, legitimate in arriving at the rights of the territory in the premises to consider it as though it had created a favor and was exacting tribute for its favor. The United States presents no problem, asserts no claim, having by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Were the controversy between the Government and the company the grant should, in the language of the Supreme Court, 150 U. S., p. 14, receive a liberal construction in favor of the purposes for which it was

enacted, and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the territory to settle their respective rights. The company derives its rights from Congress, and they should be ascertained and determined by rules that will evolve the intention of Congress, and not by principles in the interest of a local government."

While it may be conceded that the Territory of New Mexico has the right to tax all property within its limits in the absence of any restriction placed by Congress upon such right, yet when Congress has placed a restriction as to any class of property like the exemption of the right of way under consideration, such restriction amounts to a prohibition, and in such a case, should the Territory attempt to limit the scope of the prohibition, the right to do so should be made to appear clearly and beyond any reasonable doubt.

II.

Congress granted an incomplete estate which was subject to forfeiture, for the purpose of having such estate completed and by completion relieved from the possibility of forfeiture. Attached to this estate was this exemption, which became part thereof. The exemption was not in the nature of a privilege personal to the company itself, but was a part of the estate to which it was attached, and which was given to the company for certain public uses.

New Jersey vs. Wilson, 7 Cranch, 164.
Bank of Ohio vs. Knoop, 16 How., 369.
Dodge vs. Woolsey, 18 How, 331.
Bank vs. Kelley, 1 Black, 436.
Von Hoffman vs. City of Quincy, 4 Wall., 535.
Home of the Friendless vs. Rouse, 8 Wall., 430.
Wilmington R. R. Co. vs. Reed, 13 Wall., 264.
Tomlinson vs. Jessup, 15 Wall., 454.
Matheny vs. Golden, 5 Ohio St., 361.
Kumler vs. Taber, 5 Ohio St., 442.

EIGHTH POINT.

I.

Opposed to our contention is the case of the *Atlantic and Pacific R. R. Co. vs. Lesseur*, decided by the Supreme Court of Arizona, and reported in 19 Pac. Rep., 157. An examination of this case will disclose that the decision of that Court is not only illogical, but, as to a part of it, opposed to the decisions of this Court. That Court finds, as stated by Justice BARNES, that the "right of way" is an interest in realty, and that the superstructure placed upon it became part of this "right of way," and then proceeds to hold that the exemption from taxation of the "right of way" did not exempt the superstructure, because of the fact, so far as one can determine, that there was no express exemption in the act of the superstructure as such. The force of this opinion is very much weakened by the fact that the Court held that the federal franchises of the Atlantic and Pacific Railroad Company could be rightfully taxed by the Territory of Arizona and its municipalities, although the Supreme Court of Arizona, at the time, was aware of the decision of this Court in the case of the *People of the State of California vs. C. P. R. R. Co.*, 127 U. S., 1, in which this Court held that the State of California had no power to tax federal franchises, as the above case was cited in that part of the opinion of Judge BARNES dealing with the question of the right of the territory to tax the franchise.

The appellant further cites the case of *Portland, Sage & Portsmouth R. Co. vs. City of Sage*, 60 Me., 196, but an examination of the case will disclose that it has no application whatever to the questions under consideration.

These two cases, we believe, constitute the entire authority of appellant for the proposition that the superstructure assessed and taxed was property so separate and apart from the "right of way" as to form no real part of it.

II.

In addition to these authorities the case for the appellant is based upon the three propositions stated under the 3d, 5th and 6th points in their brief, which are as follows:

"III.

"Exemption from taxation is the exception, and all such exceptions are to be strictly construed.

"V.

"Nothing but a strict rule of construction can be properly applicable to the exemption of the right of way from taxation.

"VI.

"The existence of a well-founded doubt is equivalent to a denial of a claim to an exemption from taxation."

We submit that neither one of these propositions is applicable to the questions involved in this case.

It ought to be perfectly plain that a Territory of the United States would have no power to tax any portion of the railroad built within its limits, under the Act of July 27th, 1866, whatever the rule might be in relation to any State, in which any portion of this road might be built. The decisions of this Court in Thompson vs. U. P. R. R. Co., 9th Wall., 579, and the case of the Union Pacific Railroad Company vs. Peniston, 18th Wall., 5, are not opposed to this proposition. The railroad that was assessed and taxed in each of those cases was not a railroad in which the Government of the United States had reserved a special easement, such as is reserved by the 11th Section of the act under consideration.

We submit that when Congress created the Atlantic and Pacific Railroad a post and military road, subject to the use of the United States for "postal, military, naval and all other government services," it created an absolute property right or

interest of the United States therein. This right or interest so created in this road excepts it from the application of the principles established by the cases referred to.

For the reasons given by Mr. Justice BRADLEY, in his dissenting opinion in the Peniston case, this Court, in California vs. C. P. R. R. Co., 127 U. S., 1, determined that a State could not tax a federal franchise without the permission of Congress. The reasoning of the Court, in the case last referred to, is applicable to a railroad which has, like the one in question, impressed upon it, as a part of it, a special right on the part of the Government to use it for the purpose of moving trains and cars upon whenever it sees fit, at such compensation as it may establish, and especially so when when such railroad is created for the purpose of becoming a national highway—from the Mississippi Valley to the Pacific Ocean.

Whether or not this Court would follow the Peniston case in the case of this railroad, if the question of the right of a State to tax its roadbed were raised, is immaterial, as there is no question that a Territory which exists by permission of Congress has not the right to in any wise interfere with this railroad, by taxation or otherwise. This railroad itself was, and is, impressed with a peculiar public use, such as is not attached to railroads generally. This peculiar public use, creating, as it does, a property interest in the Government of the United States, should be protected from interference by either State or Territory, as fully as the franchise of the company itself is protected. The right to tax is the right to destroy. If New Mexico has the right to tax this superstructure, it necessarily has the right to make such a tax a lien thereon, and to have the superstructure sold under such lien.

VALENCIA COUNTY CASE.

I.

Case No. 458 involves the same questions we have already discussed, and presents the same facts, with this difference:

There was an assessment made in Valencia County, in 1896, for the years 1892 and 1893, years when the railroad company had possession of this property; and the assessor, after determining the assessed value of the property, added a penalty of one-fourth of the assessed value to the assessment, for an alleged delinquency on the part of the Atlantic and Pacific Railroad Company itself, in omitting this property in its returns.

It surely will be conceded that a penalty accruing against the railroad company, for acts of omission on its part, would not be a sufficient basis for a claim against the receiver, to be paid out of the trust funds in his hands, as a claim superior to the lien of the mortgages.

It is stated, on page 4 of brief of appellant, in its statement of its case, that sixty and seven-hundredths (60.07) miles of the road in Valencia County was built on right of way acquired from private owners. The petition filed by the appellant before the District Court claimed that the exemption of the right of way is only the exemption of the right of way over the public domain; that, wherever the right of way was acquired from private owners, this right of way is not exempt (Tr., 32). We suppose that the statement is made for the purpose of showing that this sixty miles of road, over land acquired from private owners, is not exempt, either as to the right of way or the superstructure upon it.

This position is not tenable. From the argument which has preceded there can be no possible doubt but that the exemption was intended to apply to and cover the entire right of way, whether acquired from private individuals or whether the same was upon the public lands. The provision is general: "And the right of way shall be exempt from taxation within the territories of the United States." The term is general. It is not "the right of way aforesaid," nor a right of way defined or limited in any manner. There is no authority for limiting it to the right of way which is located

upon the public domain. To do so would be to interpolate in the act words not warranted by any reasonable or justifiable inference. As stated heretofore, to permit the territory to tax any portion of the right of way or the railroad would be to empower the territory to enforce the tax by levy and sale—to sell a portion of the entire railroad, thereby segregating a mile or so from the balance of the railroad, and destroying the line for the purposes intended by Congress. Under the act the railroad company is granted a right of way through the public lands, and it is also empowered, where necessary, to condemn and take, to the same width or extent, a right of way over the lands of private individuals. But, however acquired, it is still "the right of way" of the railroad company. The argument heretofore made is equally applicable, and demands the same construction of the provision of the Act of Congress in respect to exemption from taxation in the one case as in the other.

The particular assessments in question cannot, however, be upheld, because, as previously shown, the assessor had no authority or power under the laws of New Mexico to assess a fixture or superstructure separately from the land. No power was given to the assessors to assess as personalty that which the statute declared to be realty and assessable, if at all, as such. Such assessments having been made, therefore, without authority of law, are void and afford no basis for the levying of taxes.

FINAL POINT.

The levies of taxes sought to be recovered by the intervening petitions in the three cases now before this Court are illegal and void, regardless of any question of exemption or of any statutory authority of the Territory of New Mexico.

I.

If the Court should hold that the exemption granted by the Act of Congress to the Atlantic and Pacific Railroad Company does not include the superstructure of the railroad, and if the Court should further hold that under the statutes of New Mexico, the assessments in the cases at bar were properly and legally made, then we claim that the levies of the taxes so assessed are illegal and void because against public policy.

No argument or citation of authorities is required to establish the proposition that by the 11th Section of the act the Government of the United States acquired an easement in the constructed railroad of the Atlantic and Pacific Railroad Company for all time to come, an easement of great importance and of very great value to the Government. In virtue of this easement, the United States has the right at any time to operate for its purposes, and upon its own terms, the trains or cars of the Atlantic and Pacific Railroad Company over the railroad of that company. The right claimed by the Territory to tax the superstructure of the railroad includes the right to destroy the same. The only right that the Territory had to intervene in the foreclosure suits for the purpose of having a portion of the trust fund appropriated to the payment of the taxes was upon the theory that the taxes sought to be recovered were specific liens upon the superstructure, under the provisions of Section 4057 and of Section 4073 of the statutes of New Mexico, which read as follows (Compiled Laws 1897) :

SECTION 4057. " Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the date of the levy thereof, and taxes due from any person upon personal property shall not be satisfied nor the lien removed until the taxes are abated or paid on the property sold for the payment thereof. The tax

list and warrants hereinbefore provided for shall have the force and effect of an execution against the person or property assessed."

SECTION 4073. " All real estate, and all interest or title which any person may have therein upon which taxes shall not have been paid before the first day of January of each year shall be subject to sale as hereinafter provided for the sale of bonds for taxes."

In the case of California vs. C. P. R. R. Company, 127 U. S., 1, this Court considered very carefully the power of the State of California, to tax certain franchises granted by Congress, among which was a franchise granted by the 18th Section of the act under consideration.

We quote from the opinion of Justice BRADLEY upon this question as follows :

" It cannot, at the present day, be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transporation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisible therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations (see *Pacific Railroad Removal Cases*, 115 U. S., 1, 14, 18.

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. * * * In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden and may be laid so heavily as to destroy the thing taxed or render it valueless. As Chief-Justice MARSHALL said in McCulloch vs. Maryland, 'the power to tax involves the power to destroy.' Recollecting the fundamental principal that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this Court in *McCulloch vs. Maryland*, 4 Wheat., 316; *Osborn vs. The Bank of the United States*, 9 Wheat., 738, and *Brown vs. Maryland*, 12 Wheat., 419, and in numerous cases since which have followed in their lead, abundantly sustain these views we have expressed. It may be added that these views are not in conflict with the decisions of this Court in *Thomson vs. Pacific Railroad*, 9 Wall., 579, and *Railroad Co. vs. Peniston*, 18 Wall., 5. As explained in the opinion of the Court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations (18 Wall., 35, 37)."

It seems to us that the reasoning of Justice BRADLEY upon the question discussed by him is fully applicable to the proposition under consideration. The Government of the United States has an important and valuable easement in the Atlantic and Pacific Railroad, which, by reason of such easement, has become an instrument enabling the Gov-

ernment to exercise one of its most important functions. The Atlantic and Pacific Railroad, in virtue of such easement, is an instrument by means of which the United States Government is enabled to exercise one of its most important functions. Has the Territory of New Mexico, a mere municipality of the United States, power to destroy the railroad in which the United States has so valuable an easement, which was created for the purpose of aiding the United States in the performance of its functions? In the absence of an express grant of power by Congress, public policy prohibits the taxation by the Territory of New Mexico of the property which is in question in these cases.

We therefore respectfully submit that the judgment of the Supreme Court of the Territory New Mexico was correct and should be affirmed.

C. N. STERRY,
Solicitor for Receiver C. W. Smith and United States Trust Co.

E. D. KENNA,
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Office Supreme Court U. S.
FILED
OCT 25 1898
JAMES H. McKENNEY,
Clerk.

Nos. 106, 169 and 170.
Brf. of Morawetz for Appellees

Filed Oct. 25, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

TERRITORY OF NEW MEXICO, *Appellant,* *against* UNITED STATES TRUST COMPANY OF NEW YORK ET AL., *Appellees.*	Nos. 106, 169 and 170.

Memorandum of Argument for Appellees.

VICTOR MORAWETZ,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1898.

TERRITORY OF NEW MEXICO, Appellant, AGAINST UNITED STATES TRUST COMPANY OF NEW YORK ET AL., Appellees.	Nos. 106, 169 and 170.

Memorandum of Argument for Appellees.

These cases involve the following two questions, viz. :

1. What is the proper construction of the grant of exemption from taxation contained in Section 2 of the Act of Congress incorporating the Atlantic and Pacific Railroad Company, approved July 27, 1866, entitled " An act granting lands to aid in the construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast " (14 U. S. Stat., p. 292) ?

2. Were the assessments of the improvements, cross-ties, rails, bridges, culverts, structures, etc., constituting the railroad of the Atlantic and Pacific Railroad Company lawful and regular under the Act of Congress and the statutes of the Territory of New Mexico ?

Section 2 of the Act of Congress is as follows:

"SEC. 2. *And be it further enacted*, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water stations; **and the right of way shall be exempt from taxation within the territories of the United States.**" * * *

We contend on behalf of the Appellees:

First. That the term "right of way" in this grant of exemption from taxation means *the strip of land or way*, which, pursuant to the Act of Congress, was appropriated and set apart for the construction and maintenance of the line of railway described in the Act; or, if it does not mean the strip of land or way itself, then it means *the right, interest or estate of the Railroad Company therein;* and, in either event, the exemption relates to this strip of land or way in the condition in which Congress intended that it should be placed by the construction of the line of railway.

Secondly. That there is no law of the Territory of New Mexico under which the cross-ties, rails, bridges, culverts, structures and other improvements, constituting part of this strip of land, can be assessed and taxed separately from the strip of land itself, or the estate, interest and right of the Railroad Company therein; and that the assessments in controversy were illegal and irregular under the laws of the Territory.

I.

THE NATURE OF THE ESTATE OF THE ATLANTIC AND PACIFIC RAILROAD COMPANY IN ITS RIGHT OF WAY.

The actual nature of the estate acquired by the Railroad Company in the strip of land constituting its "way" or "right of way" is plain, whether this estate be designated in technical language as an estate in fee simple, or a conditional, qualified or base fee, or a mere easement.

Congress authorized the railroad company to build, maintain and operate a railroad upon a designated route, and granted to the Railroad Company, its successors and assigns, for that purpose, a right of way through the Territories, and declared that "*said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain.*" Congress further gave to the railroad company the right, where its line of road was located through lands not belonging to the Government, to enter upon, purchase, take and hold any other lands or premises necessary for the construction and working of the road, and declared that when property should be taken pursuant to condemnation proceedings, and paid for, "*said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid.*" It will be observed that the way acquired by the railroad company under the act was not merely a strip of land for laying its tracks, but a strip extending one hundred feet in width on each side of the railroad to be constructed.

The railroad company acquired not merely a right to use for railroad purposes this strip of land designated as its "right of way," leaving the ownership and possession in others subject to this right of user, **but the railroad company acquired the perpetual and exclusive right of possession of the land.** It acquired the right to enclose

the strip of land constituting its right of way by fences, and to exclude all others therefrom. This exclusive right of possession and use of the right of way was given to the Railroad Company, its successors and assigns in perpetuity, and by Act of Congress, approved April 20, 1871 (17 U. S. Stat., p. 19), it was authorized to mortgage the same.

It is submitted that this estate of the railroad company in the strip of land constituting its right of way is properly defined as an estate in fee, though possibly subject to a condition subsequent that the land may be forfeited if the railroad itself should ever be abandoned.

M. K. & T. R. R. Co. vs. Roberts, 152 U. S., 114.
Railroad Co. vs. Baldwin, 103 U. S., 428.
Bybee vs. Railroad Co., 139 U. S., 663.
Southern Pacific R. R. Co. vs. Burr, 86 Cal., 279.
N. Y. S. & W. R. R. Co. vs. Trimmer, 53 N. J. L., 1.

II.

MEANING OF THE TERM "RIGHT OF WAY" IN THE GRANT OF THE EXEMPTION FROM TAXATION.

In construing the clause granting this exemption from taxation the purposes which Congress intended to accomplish by incorporating the Railroad Company and the immediate object of the grant of the exemption must be considered.

In 1866, when the act was passed incorporating the Atlantic and Pacific Railroad Company, there was no completed railroad across the continent, but charters had been granted incorporating the Northern Pacific and the Union Pacific Railroad Companies. It was deemed a matter of pressing public interest to secure the construction of the lines of these com-

panies, and large bounties were offered in order to induce the public to furnish the necessary means.

Section 3 of the act incorporating the Atlantic and Pacific Railroad provides: "That there be and hereby is granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of the said line of railway and its branches, every alternate section of public land," etc.

Section 11 of the Act provides: "And be it further enacted, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

Contemporary history shows that large donations had been made in 1862 and 1864 to secure the construction of the Northern Pacific and Union Pacific railroads—donations far richer than those granted to the Atlantic and Pacific Railroad Company—but that these donations, up to the time of the passage of the Atlantic and Pacific charter, had not proved sufficient to secure the construction of these railroads. It is only reasonable, therefore, to presume that when Congress granted this exemption from taxation it intended to grant something of value. We do not claim that the Court should on that account extend the exemption beyond the natural meaning of the terms of the grant; but we do claim that the grant should be construed according to the reasonable and fair meaning of its terms, having regard to the conditions existing when the grant was made, and that this Court will not, by applying an unfair method of construction, defeat the reason-

able expectations of those who relied upon the promise of the Government.

It has repeatedly been recognized by the Courts that the term "right of way" is commonly used to designate the strip of land or way appropriated for the construction and maintenance of a railroad, and not merely the intangible right or privilege of passing over and using this strip of land or way.

In Central Trust Co. vs. Wabash Ry. Co., 29 Fed. Rep., 546, the question arose as to the proper construction of a contract made by a railroad company to permit other companies to use its "right of way." Mr. Justice BREWER, in delivering the opinion of the Circuit Court, used the following language:

"The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right of way.' Now, the term '*right of way*' has a two-fold signification—it sometimes is used to describe a right belonging to a party, a right of passage over any tract; and *it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.* Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms 'right of way,' 'track' and 'road-bed' frequently appear, and in all cases the term 'right of way' is used as descriptive of the strip above referred to."

In the same case, upon appeal to this Court (reported in 138 U. S., under the title of Joy vs. St. Louis), the language of Mr. Justice BREWER was quoted and approved; and this Court furthermore decided that the grants to other roads of the right to use the "right of way" embraced the whole thereof, and that the track was a mere incident to the enjoyment of the right of way. Mr. Justice BLATCHFORD, in delivering the opinion of the Court, said:

"The grant to other roads of the privilege of using the right of way applied to the whole of such right of way through the park, and not to a particular part of it. *The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident.* A right of way is of no practical use to a railroad without a superstruct-

ure and rails. *The track is a necessary incident to the enjoyment of the right of way.*"

In Keener vs. Union Pacific Ry. Co., 31 Fed. Rep., 126, the Circuit Court decided that, under a statute providing that "taxation shall be made upon the entire railway within this State and shall include the *right of way*, roadbed, etc," the term "right of way" did not relate to a mere intangible right, but to the strip of land appropriated by the railway company for its use, and upon which its roadbed was built, and that this strip of land was taxable at its full cash value.

It is, however, immaterial whether the railroad company acquired an estate in fee or an easement in the strip of land, or way which constituted its "right of way;" and it is equally immaterial whether the term "right of way" in the exemption from taxation be construed as meaning this strip of land or way itself or merely the right, interest or estate of the railroad company therein.

If the title to the strip of land constituting the right of way remained in the United States or in the other owners from whom the right of way was taken by condemnation proceedings, and the railroad company merely acquired an easement therein, then the term "right of way" in the act means the perpetual and exclusive right to possess and enjoy this strip of land having a railroad constructed thereon, and this perpetual exclusive right of possession and enjoyment was exempted from taxation. If the title to the land constituting the right of way remains in the Government, then this title includes the railroad, which has become part of the land, and neither the land and railroad, nor the perpetual and exclusive right of the railroad company to use this land and railroad, can be taxed.

If, on the other hand, the railroad company acquired title to this strip of land or way, then the exemption of the right of way from taxation exempted it in the form in which it was

placed by the railroad company, in compliance with the requirements of the Act of Congress, by converting it into a railway.

It is too clear to require argument that the cuts, fills, embankments, bridges, ties, rails and permanent structures constituting the railroad of the Atlantic and Pacific Railroad Company became inseparably affixed to the land constituting its right of way, and cannot be taken up and separated therefrom by the railroad company, its successors or assigns; and it seems equally clear that they cannot be separated therefrom by the Territory of New Mexico through the operation of its taxing power. Power to tax includes power to seize and sell for non-payment of taxes. Could the Territory of New Mexico seize and sell for taxes the embankments, tunnels, cross-ties, rails, bridges and other structures upon the right of way except by seizing and selling the entire right of way and thus wholly defeating the exemption from taxation?

Counsel for the Territory could not deny that the land constituting the *way* upon which the railroad was built is exempt from taxation; they could not deny that the *right and estate* of the Railroad Company in this way is exempt. They were bound, therefore, to take the position that the improvements of this way—the cuts, embankments, ditches, tunnels, the ties in the ground and the rails fastened thereon—are properly separable from the way or right of way itself and do not constitute part thereof (Appellant's brief, Point II.). But such improvements are not in truth and in fact separate or separable from the way or right of way. They are as much a part of the way or right of way as the ditches and underground drains, banks and other permanent improvements of a farm are part of the farm itself. They are constituent parts of the property or estate which was exempted from taxation; and, as the whole includes its constituent parts, the exemption of the way or right of way from taxation exempts those improve-

ments which are part of it. While the Territory nominally seeks to support this taxation on the ground that the property taxed is separate from the way or right of way which is exempt, this is a mere fiction. **In reality, the position of the Territory is that the exemption must be so construed as to except from its operation the increase of value of the right of way resulting from the construction of the railroad, and that the right of way is taxable to the extent of such increase of value.**

In order to sustain the position of the Territory of New Mexico in these cases it must be held that Congress did not intend to exempt from taxation the right of way in the condition in which the Railroad Company was required to maintain and use it, but intended that all improvements of the right of way, by the construction of the line of railway without which the right of way would have no value, should be excluded from the exemption and should be subject to separate taxation. It must be held that practically all that Congress intended to grant was the intangible right or franchise to construct and maintain a railroad through a trackless waste of arid land—a right which Congress by general statute has granted equally to all railroad companies in the United States—a right which is practically valueless.

We submit that such a construction of the act cannot be sustained, because it would warp the language of the act from its natural and ordinary meaning, and would defeat the evident purpose of Congress. If that construction of the act is correct, then the grant of the exemption from taxation was a delusion and a snare to those who regarded it as a valuable donation or bounty offered by Congress to secure the construction of this railroad.

Congress intended the grant of exemption from taxation to be a bounty or donation of value. Congress intended the right of way thus exempted from taxation to be used for a

railroad. Congress knew that, as has been stated by this Court in *Joy vs. St. Louis, supra*, "the track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no practical use to a railroad company without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way." Is it reasonable, then, to hold that Congress intended that the exemption from taxation should apply only to the right of way as an unimproved strip of land which could not lawfully be used for any purpose except railroad purposes and which was of no value for any other purpose, and that everything done by the railroad company in improving this right of way by building a railroad, as required by the Act of Congress, should furnish a basis for taxation?

The opinion of the Supreme Court of the Territory of New Mexico sustaining in all respects the contention of the Appellees is printed as part of the record of case No. 106, now before this Court.

In *Northern Pacific Railroad Co. vs. Carland*, 3 Pacific Reporter, 144 (5 Mont. 146), the same conclusion was reached by the Supreme Court of Montana in construing the grant of exemption from taxation given by Congress to the Northern Pacific Railroad Company by Section 2 of its charter (13 U. S. St., 367), in identically the same language as is used in the grant to the Atlantic and Pacific Railroad Company.

It has repeatedly been held that an exemption of land or other property from taxation includes the improvements upon the land or property which, in law, become part thereof.

In the Appeal Tax Court of Baltimore City vs. The Baltimore Cemetery Co., 50 Md., 432, the defendant's charter provided that "the land of the company dedicated to the purposes of a cemetery shall not be subject to taxation of any kind."

The assessors assessed for taxation the permanent improvements on the land, claiming authority under an act requiring assessors, in valuing real estate, to estimate the value of the land per acre, and "separately to value the improvements thereon."

The Court says:

"The whole contract shows that the permanent improvements are treated as realty, as the law regards them, and in our judgment the exemption of the lands from taxation necessarily embraces also an exemption of the permanent improvements thereon, used for the purpose of a public cemetery, and which are essential to the use and enjoyment of the land for the purposes contemplated in the charter."

In Osborn vs. Humphrey, 7 Conn., 335, the question was whether the leasehold interest of a lessee of land from any ecclesiastical society under a lease for ninety-nine years, or the buildings erected upon the land were taxable under a statute of Connecticut which exempted from taxation "lands, tenements, hereditaments and other assets" granted for charitable purposes. The Court held that neither the land nor the buildings upon the land could be taxed. Judge PETERS, in delivering the opinion of the Court, said (p. 339):

"It is emphatically asked, why should not the plaintiff be taxed to the extent of his *buildings*? My answer is, the buildings are attached to the land, which the legislature, having the power and the *right*, have been pleased to exempt from taxation for the public good." * * *

In Parker vs. Redfield, 10 Conn., 490, an ecclesiastical society divided its land into building lots, and leased the lots to parties for various terms. One of these lessees was taxed for a building on the land. The agreement in the lease was that the lessee should have the right to remove the buildings at the end of his term, and the Court held that, in consequence of this, the building was personalty—did not become a part of the realty, and was not exempt with the realty. BISSELL, J., delivering the opinion of the Court, said:

"It is readily conceded that, had the Episcopal Society improved the lands granted to them, by erecting buildings thereon, or in any other manner, the improvements so put on, would not, either in their hands or the hands of their lessees, have been liable to taxation. They would have constituted a part of the land, and would, therefore, have been exempted within the provisions of the statute.

"So, also, had they leased the lands for a term of 999 years, and buildings had been erected thereon by their lessees, the case would have fallen within the principle of Osborne vs. Humphrey, and the buildings, as well as the land, would have been exempted, and for the same reason; viz., that they were a part of the land."

In Richmond & Danville R. R. Co. vs. The Commissioners of Alamance, 84 N. C., 504, it appeared that the charter of the North Carolina Railroad Company contained a provision that "all the real estate held by the company for right of way, for station places of whatever kind, and for workshop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum."

The Supreme Court held that this provision exempted from taxation a lot occupied by the company, upon which was constructed an office building used by the officers of the company, there also being on the same property the post-office and two buildings occupied by private persons as stores and warehouses, and also the machinery in the work-shops.

In its opinion in this case the Supreme Court used the following language:

"It is manifest that the erection of work-shops, such as those put upon the land of the company, was in contemplation of the Legislature when the act was passed, and a fair and reasonable construction of the language will take in the machinery and its accessories to be operated in the work-shop. Of what use is the naked building, or land without these fixtures and implements, in accomplishing any benefit to the road? And why should the one, and not the other, so intimately associated for a common purpose, be relieved from the burden?"

"We do not enter into the niceties and technical distinctions in reference to what are and are not fixtures, and pass

with the land in controversies between landlord and tenant, vendor and vendee and others, but looking to the broader purpose of exemption in inviting the investment of capital in a great self-supporting enterprise for the improvement of the State, in connection with the large contribution of the State itself to insure its completion, we cannot separate the building from the machinery and necessary adjuncts within in giving effect to the provision for exemption, and in our opinion all are protected alike. The cases cited in the brief are but in confirmation of this view. Makepeace, *ex parte*, 9 Ired., 91; Bryan vs. Lawrence, 5 Jones, 337; Latham vs. Blakely, 70 N. C., 368; Bond vs. Coke, 71 N. C., 97; Deal vs. Palmer, 72 N. C., 582; Moore vs. Valentine, 77 N. C., 188."

See, also, Richmond vs. Railroad Co., 21 Gratt., 604.

In United States vs. Denver &c. Railway Co., 150 U. S., 13, this Court said:

"Again, exemption from taxation is construed with greater strictness in favor of the State than grants of public property or rights, for the reason that taxation is more essential to the existence of government than ownership and possession of public property. Yet it has been held in several well-considered cases that where a railroad is exempt from taxation such exemption extends to structures like those in question. Thus in the case of the *Lehigh Coal & Navigation Co. v. Northampton County*, 8 W. & S., 334, it was held that as an incorporated canal was not taxable, not only the bed, berm-bank and towpath of the canal, but the lock houses and collectors' houses were also exempt, these being considered constituent parts of the canal or necessarily incident thereto. So in *Railroad Co. v. Berks County*, 6 Penn. St., 70, it was held that as the railroad was exempt from taxation, water stations and depots, including the offices and places to hold cars, &c., being necessary and indispensable to the construction and use of the road, were within the exemption, while warehouses and coal lots, intended for the mere convenience of the road, were not so exempt. The principle of these cases is followed and illustrated in the case of *State v. Commissioners*, 3 Zabr. (23 N. J. L.), 510, and in the case of *Worcester v. Western Railroad*, 4 Met. (Mass.), 564."

The cases cited upon this point in the brief of counsel for the appellant do not apply.

In *People vs. Cassity, 46 N. Y., 50*, the Court of Appeals of New York construed a statute providing that "all lands * * * within this State, whether owned by individuals or

by corporations, shall be liable to taxation. * * * "The term 'land' * * * shall be construed to include the land itself, and all buildings and all other articles erected upon or affixed to the same * * *; and the term 'real estate' and 'real property' * * * shall be construed as having the same meaning as the term 'land' thus defined;" and the Court decided that the right of a street railway company to lay down a track and use the same for the passage of its teams and vehicles, constituted an interest in "land" or "real estate" within the meaning of the statute and that the track, being affixed to the land, was therefore liable to taxation.

The case of *People vs. Commissioners of Taxes, 82 N. Y., 459*, is to the same effect.

Counsel for the Appellant have cited various cases in which it was held that an occupant of public lands has a possessory interest or claim which constitutes property having a substantial and salable value, and that such interest or claim, and any improvements upon public lands so occupied, are taxable as property of the occupant (See *People vs. Shearer*, 30 Cal., 645; *Crocker vs. Donovan* (Oklahoma), 30 Pac. Rep., 377; *Waller vs. Hughes* (Arizona), 11 Pac. Rep., 122; *Turney vs. Saunders*, 4 Scam., 527). This proposition we do not dispute. It tends to support our claim that an exemption from taxation of a possessory interest in land for railroad purposes exempts the possessory interest in the land as improved for railroad purposes.

In *Portland, etc., R. R. Co. vs. City of Saco, 60 Me., 196* (cited by counsel for appellants), the point decided was that certain real estate of the railroad company, including a depot and other buildings thereon, were taxable as real estate, although it was provided by law "that the track of the road and the line on which it is constructed shall not for the purposes of taxation be deemed real estate." In its opinion the Court used the following language:

"The exemption from taxation is limited to 'the track of the road and the line on which it is to be constructed.' It

does not in terms extend to their appurtenances, railroad depots constituting no part of 'the track of the road.' If they are exempt from taxation it is because they are to be regarded as 'the line on which the track is constructed.'"

The decision of the Supreme Court of Arizona in the case of Atlantic and Pacific R. R. Co. vs. Leseuer, 19 Pac. Rep., 157, is in favor of the contention of the appellants, but it is submitted that the reasoning of the Court shows that this decision is not entitled to weight as an authority. In that case the Court say:

"No one can question that a right of way is an interest in the realty; nor that culverts, bridges, railway switches, depot buildings, etc., thereon become part of the realty. He who has title to the right of way has title to the superstructure. They would pass by grant and would be subject to the laws regulating the conveyance of real estate, including the statute of frauds. All this will be conceded, but does it follow that the exemption of the right of way exempts all appurtenances afterwards attached thereto?" (p. 158).

"Congress granted a right of way over the public lands and in the same section it exempts what is granted from taxation. It did not grant improvements, culverts, bridges, buildings, iron, ties, etc. This was property to be placed there afterwards by the grantees. Shall we infer that it exempted what it did not grant when it does not say so or use words looking in that direction? We think not. We should stand by the letter of the law, in favor of equality of taxation" (p. 159).

In the same case, the Supreme Court of Arizona held that, notwithstanding the decision of this Court in California v. Pacific Railroad Company, 127 U. S., 1, the franchise which Congress granted to the Atlantic and Pacific Railroad Company could be taxed by the Territory.

III.

THE STATUTES OF NEW MEXICO DO NOT AUTHORIZE THE SEPARATE TAXATION OF IMPROVEMENTS PLACED UPON REAL ESTATE, AND THE ASSESSMENTS IN THESE CASES ARE IRREGULAR AND ILLEGAL.

The sections of the Compiled Laws of New Mexico, under which the assessments in these cases were made, are set forth at length in our brief.

Section 2807 is as follows:

"2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined.

"*First.* The term 'real estate' includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries, in and under the land, *and all rights and privileges appertaining thereto and improvements.*

"*Second.* The term 'improvements' includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

"*Third.* The term 'personal property' includes everything which is subject of ownership not included within the term 'real estate.'

"*Fourth.* The term 'credit' includes every claim and demand for money, or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries, or payments expected for services to be rendered, are not included in the above term."

Section 2822 requires the assessor in each year to prepare lists showing separately all taxable property of each person, the county in which such property is situated or in which it is liable to taxation, and a description by legal subdivisions, or otherwise, sufficient to identify, of the real estate of each person, and a detailed statement of his personal property.

Section 2834 provides that an assessment roll shall be made out in which must be listed all the property in the county subject to taxation, with the names of the persons to whom the property is assessed and the several species of property as hereinbefore indicated.

It appears, therefore, that not only is there no provision in the statute of New Mexico authorizing the assessment and taxation of improvements upon real estate separately from the real estate itself but, on the contrary, the statute in express terms provides that "real estate" for the purposes of the statute shall include "*all rights and privileges appertaining thereto and improvements.*"

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JAMES H. McKENNEY,
Clerk.

No. 169.

Brf. of Sterry, Kenna & Dunlap for

IN THE Appellees (rela

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Filed Apr. 3, 1899.

THE TERRITORY OF NEW MEXICO,
Appellant.

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK, and C. W. SMITH, Receiver of the property of the Atlantic and Pacific Railroad Company,
Appellees.

No. 169.

BRIEF AND ARGUMENT OF APPELLEES UPON PETITION FOR REHEARING FILED BY APPELLANT.

C. N. STERRY,
SOLICITOR FOR APPELLEES.

E. D. KENNA,
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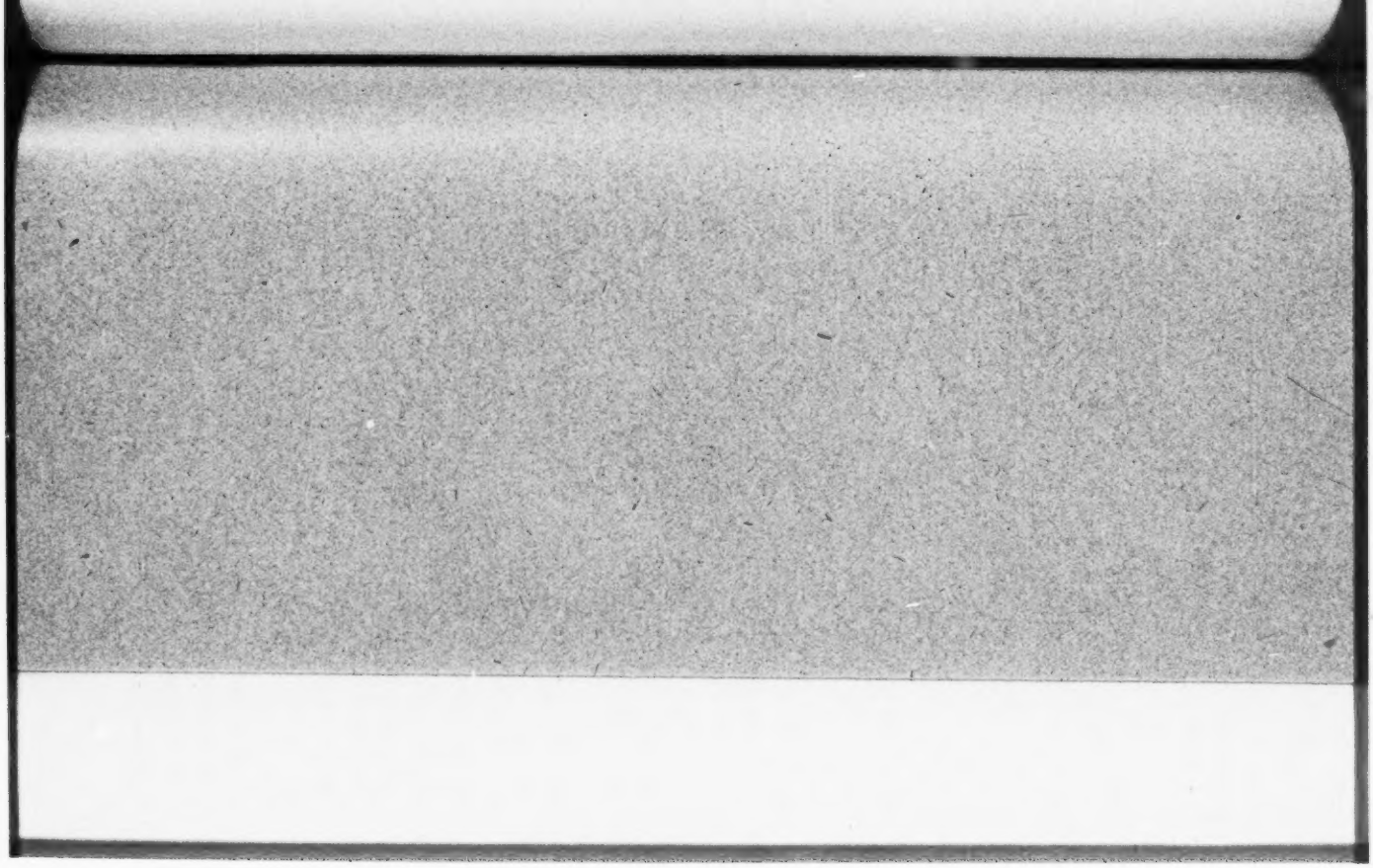

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PRELIMINARY.

This court ought not to consider the question sought to be presented on pages 58 and 59 of the petition for rehearing, for many very cogent reasons, among which are the following:

FIRST POINT.

The question proposed for the consideration of this court, under its order permitting the filing of the petition for rehearing in case No. 169, is not presented by the record in that case, and never was presented to the District or the Supreme Court of the Territory, or to this court, in any hearing had in the case, prior to the presenting of the petition for rehearing.

I.

The foreclosure suit in which the intervening petition was filed was pending before the District Court of the Second Judicial District of the Territory of New Mexico for the trial and hearing of causes arising under the constitution and laws of the United States, by virtue of the jurisdiction granted to such courts by section 1910 of the Revised Statutes of the United States. Under this section the procedure in reference to the intervening petition in that court, and the jurisdiction of the court in hearing the same, were the same as if that court had in fact been one of the Circuit Courts of the United States.

The petition of intervention that was filed in this cause appears on pages 30-32, inclusive, of the transcript, except that the exhibits which were attached thereto, consisting of copies of the assessments upon which the taxes claimed were levied, appear on pages 80-85 of transcript.

That the court may fully understand the claims of the Territory as presented by this petition, we here copy that portion of the petition referring to the claim for taxes

for the year 1892, together with the assessment shown by the petition as the basis of the taxes levied for that year:

"Certain property of the Atlantic and Pacific Railroad Company was omitted in the assessment of taxable property within the County of Valencia in the Territory of New Mexico for a series of years, beginning with the year 1892 and ending with the year 1896, and was not put upon the assessor's books for said years, and the assessor in said county having failed to list the same or place it upon his roll before it was returned to the county commissioners, the collector of taxes in said county, after the tax list for the year 1896 had been delivered to him, proceeded to list, value and assess such property in the manner that the assessor might have done, and to enter such assessment in his tax-list and to assess taxes thereon as hereinafter in detail more fully set forth.

"The said collector for the year 1892 entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1892, for territorial and county purposes, was at the rate of twenty-one and nine-tenths mills, so that the amount of tax upon the valuation aforesaid amounts $13,586.54, one half of which became deliquent upon the first day of January, 1893, and the other half on the first day of July, 1893, said halves bearing interest, respectively, from said respective dates at the rate of twenty-five per centum per annum."

The only reference to this question contained in the petition are the allegations of the seventh paragraph, reading as follows:

"The receiver of the property of the said railroad company, heretofore appointed in this cause, refuses to pay the said taxes or any part thereof and disputes the validity of the same upon the ground that all of the property so listed, valued and assessed as aforesaid is ex-

empt from taxation by virtue of the provision contained in the second section of an act of Congress, entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' which became a law on the 27th day of July, 1866; but your petitioner charges that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad, where it may pass through the public domain, and does not extend to any improvements made upon the said right of way, nor to the said right of way itself where it passes through land not included in the public domain."

The assessments referred to, made for 1892, and attached to the petition, are as follows:

"The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railway Company in the County of Valencia, and constituting 'improvements' upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile.....$214,500

"Also the cross-ties, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company, in said County of Valencia, and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550."

The further claim for taxes for the years 1893-4-5-6, as stated by the pe ition, and the assessments upon which the same were based, are precisely the same as stated for the year 1892, with the exception of amounts and dates.

To this petition the Receiver and the Trust Company filed five joint and separate pleas, in each of which it

was alleged, among other things, that the line of the Atlantic and Pacific Railroad Company was constructed under the Act of Congress approved July 27, 1866, through Valencia County, for a distance of 93.458 miles, and that its right of way was 200 feet in width (with additional ground for stations, etc.) and consisted of fifty-eight miles over land which was not Government land, *but which was acquired by the company through the rights conferred upon it by the Act of Congress*, and that the remainder of the right of way was over public lands. (Rec., 33-78.)

This statement in the pleas as to the mileage over public and private lands was made to meet the allegations in reference thereto in the petition as above quoted.

It will be observed that the collector in assessing the property *which he actually assessed*, as shown by the intervening petition and its exhibits, and upon which the taxes claimed were levied, *made no distinction between the "right of way" over government land and the "right of way" over lands other than government land.* No attempt was made by the collector or anyone else *to assess any portion of the "right of way" through Valencia County, whether located upon land held in private ownership or upon public land.* While the collector separated the mileage of this "right of way" through his county so as to show that which was located upon government land separate and distinct from that which was located upon land held in private ownership, such separation was evidently *made for some purpose other than that of assessment of any portion of the "right of way" not located on public land.* The assessor proceeded upon the theory that the entire superstructure was personal property, so entirely separated from whatever interest the

company had in the "right of way," whether located on public land or not, that it should be assessed by itself, separate and apart from the "right of way," and not as a part of it. If there was any thought in the mind of the collector that the fifty-eight or sixty miles of "right of way" which was located on land held in private ownership was not within the exemption clause of the second section of the act, he certainly would have assessed such mileage, in addition to the other assessment made, as it is easy to see that fifty-eight miles of "right of way" 200 feet in width, together with station grounds, etc., would involve a large amount of valuable property for taxation if subject to assessment.

The petition for intervention, having specifically stated the origin of the taxes sought to be declared a lien on the property being foreclosed, disclosed by such statement that the entire case of the Territory was predicated upon the right to treat the superstructure of the railroad placed upon its "right of way" as personal property, separate and distinct from the "right of way" itself, and separate and distinct from whatever interest the railroad had in the real estate over which its right of way was located. The petition therefore disclosed upon its face that the question as to whether any portion of the "right of way" was exempt or not, was not of the slightest materiality to the theory upon which the assessment was made and the taxes levied, and, therefore, the sole claim made by the Territory, in the District Court, in the Supreme Court of the Territory, and heretofore in this court, may be stated as follows:

1. That the superstructure placed upon the "right of way" of the Atlantic and Pacific Railroad did not become any part of the real estate or interest in real estate

upon which such "right of way" was located, but remained personal property of the company, subject to taxation as personal property, entirely separate and distinct from the real estate upon which it was placed.

Or to state it in another way:

2. That the "right of way" of the Atlantic and Pacific was such a mere easement that the superstructure built upon it did not become any part of it, and, therefore, the exemption of such "right of way," either in whole or in part, did not exempt this superstructure, which was not and could not be a part of it.

II.

The decision of the Territorial Supreme Court in case No. 106 (the Bernalillo County case) was rendered December 18, 1896. The intervening petition in this case was filed six months afterwards, on June 10, 1897, by the same counsel who had conducted for the Territory the Bernalillo County case, and who was, of course, thoroughly familiar with that case and the decision of the Supreme Court. Afterwards, on June 23, 1897, the question of the sufficiency of the several pleas filed by the receiver to this intervening petition came on to be heard by the court, and upon such hearing the District Court held:

"That it is neither necessary nor proper to pass upon the question of the sufficiency of said pleas, for the reason that the said intervening petition and matters and things therein set up fall within the decision of the Supreme Court of New Mexico in the matter of a like intervening petition in this cause, rendered on the 18th day of December, 1896, and are therefore not sufficient to entitle the said intervening petitioner to the relief sought by its petition, and that this petition ought to be dismissed.

"It is therefore ordered, adjudged and decreed that the said intervening petition be and the same hereby is dismissed."

It was never suggested to the court at that hearing, in any manner, that there was the slightest difference (in fact there was not) between the Valencia County case and the case already decided by the Supreme Court. In the Bernalillo County case there was no question of this character presented, hinted at or suggested in any of the hearings before the courts; neither was there any statement of the mileage of the "right of way" over lands held in private ownership by the petition filed in that case, or by any other part of its record.

If it be true that the fact of some of the mileage of the Atlantic and Pacific in Valencia County being upon right of way acquired from private parties made any difference so far as the question of exemption of *the property which was assessed* was concerned (which we strenuously deny), it was clearly the duty of the counsel for the Territory to have shown this to the District Court at the time of its action. The District Court assumed, *with the tacit consent of the counsel for the Territory*, that this case was precisely like the Bernalillo County case, and that there were no questions presented by this case which were not covered by the decision of the Supreme Court.

III.

Upon the appeal taken from the order of the District Court dismissing this petition this question was not presented to the Supreme Court of the Territory. Section 3,140 of the Compiled Laws of New Mexico (Compila-

tion of 1897), which was in force at the time of this appeal, provided, among other things, in relation to appeals from the District Court to the Territorial Supreme Court, as follows:

"3140. * * * On appeals and writs of error the appellant and party in error shall assign errors on or before the first day of the term to which the case is returnable; in default of such assignment of errors the appeal or writ of error may be dismissed. * * *"

Pursuant to this statute, assignment of errors was filed by the solicitor general of the Territory in the Supreme Court on August 3, 1897, as follows:

"Now comes the Territory of New Mexico, appellant, and makes the following assignment of errors in the above-entitled cause, and alleges said grounds of error as reasons why the decree rendered therein should be reversed:

"1. That the court erred in holding that appellant's intervening petition and the matters and things therein set up are and were not sufficient to entitle appellant to the relief sought by its petition.

"2. That the court erred in refusing to grant appellant the relief sought by and claimed in said intervening petition.

"3. That the court erred in dismissing said intervening petition.

ALBERT B. FALL,
Solicitor General of New Mexico.

F. W. CLANCY,
Of Counsel."

Afterwards, on the 12th day of August, a further assignment of errors was filed by present counsel for the Territory:

"Now comes the said appellant, by its solicitor, and says to the court here that there is manifest error in the record and decree in this cause, and assigns for error that the court below erred in dismissing the intervening petition of the appellant. Wherefore appellant prays that

the decree of the court below may be reversed, vacated and set aside, and that a decree be entered herein as to this court may seem proper and according to law.

F. W. CLANCY,
Solicitor for Appellant."

It will be observed that therewas never a suggestion in the assignment of errors filed of there being any distinction between the assessment of improvements upon the "right of way" over public land and the assessment of improvements on the "right of way" over land held in private ownership under the provisions of the act.

IV.

The present counsel for the Territory, when this cause was pending before the Supreme Court of the Territory, filed a printed brief therein, and we file with this brief the copy of such brief served upon us under the rules of the Supreme Court of New Mexico.

It will be observed from the brief of counsel filed in the Territorial Supreme Court that neither in its statement of facts nor in its assignment of errors, nor in the arguments advanced in it, was this question presented to the Supreme Court of the Territory. The receiver filed a motion in the Supreme Court of the Territory to dismiss the appeal upon the ground that the decision of that court in the Bernalillo case had determined every question involved in this case, and this motion, upon argument, was sustained by the Supreme Court (Trans., 86, 87), showing that it determined, as it had to determine, that there was no difference between the two cases, either in fact or law. It will be seen that counsel for the Territory failed to present the question now sought to be presented to the District Court, to the Supreme Court of the Territory, or to this court upon the former hearing.

V

We believe that this court had no jurisdiction to consider this case when it was presented to it in the first instance, although we did not then raise the question. Under the provisions of section 1909 of the Revised Statutes an appeal from a decision of the Supreme Court of the Territory of New Mexico to this court is governed by the rules and regulations which would control an appeal from a decision of the Circuit Court of the United States to this court.

Section 997 of the Revised Statutes requires that there shall be annexed to and returned with the writ of error for the removal of a cause to this court from a Circuit Court an authenticated transcript of the record and *an assignment of errors.*

Section 1012 of the Revised Statutes requires that appeals from the Circuit Court shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. These statutes, read together require an assignment of errors to be filed in all cases which are appealed from the decision of a Supreme Court of a territory to this court. Rule VIII of this court requires the transmission of a copy of such an assignment of errors with the record from the lower court. The provisions of the statute and the rules are mandatory.

Defour et al. v. *Land* (U. S. Circuit of App., 5th Circuit), 54 Fed., 913.

U. S. v. *Goodrich* (Circuit Court of App., 8th Circuit), 54 Fed., 22.

Mutual Life Ins. Co. v. *Conoley* (Circuit Court of App., 4th Circuit), 63 Fed., 180.

In the case at bar no assignment of errors was ever filed in the Supreme Court of the Territory, after its decision on August 20, 1897; neither was any assignment of errors transmitted to this court, except only, of course, those filed in the appeal to the Territorial Supreme Court prior to its decision.

SECOND POINT.

Appellant, in the original brief filed in this case, sets out its assignment of errors on page 6, which were not any part of the record transmitted to this court. It is not suggested in this assignment of errors that there was any special error committed, or that the court should not affirm the dismissal of the appeal by the court below, which was affirmed by the Supreme Court of the Territory, because of the assessment based upon improvements made on that part of the "right of way" which was acquired over land owned by private parties.

In the statement of the case made by counsel in the brief originally filed in this case there is no suggestion of any question to be considered by this court of any difference between the assessment of the superstructure on the "right of way" over public land and that on the "right of way" over land acquired from private parties. It is true that in a paragraph on page 4 of the brief it is suggested that in this case there was a separate assessment of the superstructure upon that portion of the "right of way" over lands owned by private parties from the assessment of the superstructure upon the "right of way" over the public land,

and that to this extent the case was different from the other cases; but immediately following this counsel states that the *only question* passed upon by the Supreme Court of the Territory, and the only question to be considered by this court, so far as he or his client is concerned, is the broad question as to whether the exemption contained in section 2 of the charter of the Atlantic and Pacific includes the superstructure placed upon the right of way of the railroad.

One may scan the original brief filed by counsel in this case from beginning to end without finding any evidence of any thought in the mind of counsel of presenting any question such as is now attempted to be presented. It is perfectly apparent from the brief, as well as from the oral argument made at the hearing, that from the inception of this case to a point of time after the decision of this court, there was no intention on the part of counsel for the Territory to claim that there was the slightest distinction between any of the facts involved in this case and the law applicable thereto and the facts and law applicable thereto involved in the Bernalillo County case.

In view of this, the statement of counsel, on page 58 of the petition for rehearing, that—

"Attention was called to this difference in the original brief for appellant, but it does not appear to have attracted the attention of the court"—

is, to say the least, misleading, as the only place in which this difference was called to the attention of the court was (as stated) in the statement of facts, where it was specifically qualified by the assertion inferentially made that this distinction cut no figure, or, if it was a question, it was one of the minor questions not to be discussed.

THIRD POINT.

Upon the facts shown by the record the judgment of the court below must be affirmed, even if this court determines to consider the question presented at this late date in the history of the case.

I.

If we should admit (that which we most emphatically deny) that the fifty-eight or sixty miles of "right of way," of the Atlantic and Pacific Railroad in Valencia County which was located over lands other than public lands is not embraced within the exemption contained in the second section of the act, such admission would not give any right to this court to reverse the judgment of the Territorial Supreme and District Courts, because in such case, while there might have been an assessment of this fifty-eight or sixty miles of "right of way" and taxes levied thereon, *there never was such an assessment or any claim for any taxes based upon any such assessment made by the allegations of the intervening petition*, and therefore no issue of that character has ever been presented to this court or to either of the lower courts.

II.

Under the allegations of the intervening petition and the admissions contained in the pleas it must be presumed that the "right of way" through Valencia County acquired by the railroad company over lands other than public lands was acquired by proceedings had under section VII of the act of Congress approved July 27, 1866.

If the "right of way" was acquired under section VII of the act, there is no question but that the interest in the real estate obtained by the company, in procuring its "right of way" *over lands held in private ownership, was fully as great as the interest the company acquired in the "right of way" over public lands* under the grant contained in the second section.

That the court may see that we are right in this, we quote all that portion of section 7 of the act which is material, as follows (the italics are ours):

"Sec. 7. And be it further enacted that the said Atlantic and Pacific Railroad Company be and is hereby authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road, *not exceeding in width one hundred feet on each side of the line of its railroad*, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. * * And the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded *shall be held to vest in said company the title of said land*,

and the right to use and occupy the same for the construction, maintenance and operation of said road. * * * And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth."

This court has emphatically declared the law to be (in the decision heretofore made) that the superstructure of this railroad when placed upon its "right of way" became by merger a part of whatever estate was acquired by the company in acquiring such "right of way," thereby losing its separate identity as well as its character of being personal property. Sections 4019, 4032, 4044, 4045, 4056 and 4073 of the revenue laws of New Mexico (Compiled Laws of 1897), which were in force at the time of this assessment, *required* the assessment of the "right of way" and its superstructures *as an entirety*, and the assessment of the superstructure separate from the estate to which it was attached *was an illegal* and *invalid assessment*, insufficient to support the claim made for the taxes levied thereon:

"4019. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

"First. The term 'real estate' includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto, and improvements.

"Second. The term 'improvements' includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired to said land or not.

"Third. The term 'personal property' includes everything which is subject of ownership, not included within the term 'real estate.'

"Fourth. The term 'credit' includes every claim and demand for money or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries or payments expected for services to be rendered, are not included in the above term."

"4032. The assessor is required, between the first day in March and the first day in May of each year to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation. To this end he shall visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately:

"First. All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

"Second. The county in which such property is situated or in which it is liable to taxation.

"Third. A description by legal subdivisions or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st: amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewelry, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company, and all other property not herein enumerated, with the value of the different classes of property in detail."

"4044. On or before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headlines alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value, as hereinbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll all property assessed to 'unknown owners' shall be entered.

"4045. Each tract of land shall be valued and assessed separately, except when one or more adjoining tracts are returned by the same person, in which case they may be valued and assessed together.

"4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate or any personal property then in his county are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk, and such entries shall be designated as additional assessments, and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the Board of County Commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him."

"4073. All real estate, and all the interest or title which any person may have therein, upon which the taxes shall not have been paid before the first day of January of each year, shall be subject to sale as hereinafter provided for the sale of lands for taxes."

Under the provisions of these sections, where an interest in real estate is owned by a party who makes improvements thereon, such interest and improvements, as an entirety, must be assessed as real property. To separate the improvements from such interest and assess the same as personal property, or as improvements merely, would be to make an assessment not authorized by the laws of New Mexico, and hence a tax levied upon such assessment could not be enforced in court.

This court in

French v. *Edwards*, 13 Wallace, 506, and

Lyon v. *Alley*, 130 U. S., 177,

has held that the provisions of a statute as to the form and mode of assessment of property for taxation are mandatory and must be strictly pursued, to form the basis of a tax that can be enforced.

III.

Suppose that this court should hold that the portion of the "right of way" which was located on land held in private ownership was not exempt from taxation, would such a determination make valid the assessment which was made of the superstructure separate from the "right of way" to which it was attached? Would not such determination clearly fix the illegality of the assessment in question, under the provisions of the section above quoted? We do not understand from the order made as to the filing of the petition for rehearing, and from briefs thereon, that the former decision of this court, that the superstructure placed upon the "right of way" became a part of such "right of way," is open for discussion.

If this question is not open for discussion, the superstructure placed upon the "right of way" located under the terms of the 7th section of the act became at once by merger a part of such "right of way," and therefore could not under any circumstances be assessed in the manner and way that it was assessed as shown by the intervening petition, and therefore the claim for taxes made was rightly dismissed.

FOURTH POINT.

The proposition made has no merit in it, regardless of the right of the court to hear it.

I.

By the terms of the second section of the act approved July 27, 1866, the "right of way" through public lands, to the extent defined, was granted to the Atlantic and Pacific Railroad Company; and for the purpose of enabling it to procure a "right of way" over that portion of its route which should not cross public lands, the seventh section made provisions for the acquiring of the title to the same from the owners. The right to acquire the land authorized to be purchased or condemned by the seventh section was granted to the railroad company to enable it to build, operate and maintain a railroad thereon, and such strip of land, upon acquisition by the railroad, became, technically, broadly and generically a "right of way" of the Atlantic and Pacific Railroad Company, and this, whether the company acquired an estate in fee in the land or something less than an estate in fee. As Judge ELLIOTT, in his recent work on Railroads, says, in Sec. 5, Vol. 1:

"The latter term [referring to the term "right of way"] has been defined as meaning the way over which the company has the right to pass in the operation of its trains; and as including all the strip of land appropriated by the company for its use, and upon which its roadbed has been built."

Keener v. *Union Pacific Railroad*, 31 Fed., 128.

Joy et al. v. *City of St. Louis*, 138 U. S., 1.

To call a strip of land occupied by a railroad with its track a "right of way" is to characterize the strip by the usual and common name that would be applied to it, both in technical and in ordinary language.

Regardless of the character of the interest acquired by the proceedings under section 7 of the act, would Congress or anyone else call the interest actually obtained by any other name than that of "right of way"?

Counsel lays stress upon the fact that the words "right of way" are not used in the language contained in the seventh section, but the argument made, or attempted to be made, vanishes when the reading of the section shows that there was not the slightest necessity for the use of such words.

By the terms of the seventh section of the act Congress intended to authorize the company to take private property to *precisely the same extent and for precisely the same purpose* that it authorized the company to take land from the public domain by the terms of the second section. Is it possible that Congress, by using the terms "right of way" and "way" in the second section, and omitting them from the seventh section, intended that the land acquired from private owners under the seventh section should not be known, called or considered "right of way"?

To say that the words "right of way" in the exemption clause in the second section of the act are limited to the "right of way" granted over public land by the terms of the act, requires the interpolation of something not in the act itself. By the use of the language,

"—And *the* right of way shall be exempt from taxationwithin the territories of the United States,—"

Congress evidently intended the entire "right of way,"

and not merely that portion thereof which was granted over public lands.

There cannot be the slightest reason, or suggestion of a reason, for saying that Congress desired or intended to limit the exemption from taxation in a territory where its power and authority was supreme to that portion of the right of way to be located over public land, and not to any portion which might be acquired under the seventh section of the act. The power of Congress was plenary with reference to the right to exempt property from taxation in a territory of the United States. Every reason operating to create the exemption of the "right of way" in the territories through which the road was to run over the public lands in such territories would operate to exempt from taxation the "right of way" that was to be acquired over private lands, under the seventh section, in such territories.

The argument heretofore made by counsel for the Territory, both before this court and elsewhere, has always been based upon the proposition that all that the railroad company had or could acquire under any of the terms of the act was a mere "right of way" over lands belonging to others or the government. This contention is reiterated in the petition for rehearing. Now, it seems a little inconsistent for counsel to say that it is not "right of way" when the interest acquired and used happens to be over lands held in private ownership.

The entire force of the argument of counsel in his petition for rehearing, as it seems to us, is based upon the fact that Congress did not, in the seventh section of the act, specifically state that the land it authorized to be taken for the purposes of a "right of way" should be known as a "right of way," although under the law, as counsel insists, it could be known by no other name.

It is wholly immaterial how title to the strip of land used for the operation of the railroad was acquired. Whether under section 2, by grant from Congress, or under section 7, by purchase or condemnation, the strip of land of defined width is acquired for and devoted to the operation of a railroad—a *quasi* public purpose. The holding by the railroad company is different from that of an ordinary owner. The land is held, no matter how acquired, exclusively as a way for the operation of a railroad.

See

C., B. & Q. R. Co v. *City of Chicago*, 149 Ill., page 458, paragraph 10, and page 461.

However the title may have been acquired, such strip of land is, and always has been, generally known and designated as the "right of way." To say that the "right of way" which is exempt from taxation refers solely to the right of way granted in section 2 of the act, because the exemption provision is also found in that section, is to do violence to the language used. Had Congress any such intention appropriate words would have been used, such as "and such right of way aforesaid," or "the aforesaid right of way granted." On the contrary, the language is broad and is satisfied only by a construction which will embrace the entire right of way within the territories.

The language is:

"And *the* right of way shall be exempt from taxation *within* the territories of the United States."

This is equivalent to saying:

"And the right of way within the territories of the United States shall be exempt from taxation."

It is the right of way which is *within* the territories, as contradistinguished from the right of way within any state, to which the exemption from taxation applies. This is the grammatical and reasonable construction. To carry out our opponent's construction, the language should have been:

"And such right of way granted, aforesaid, shall be exempt from taxation by the territories of the United States."

The reason for our contention is obvious. Congress has supreme power over the territories and may, if it chooses, exempt any sort of property from territorial taxation or territorial regulation, within the principle announced by this court in *The Mormon Church* v. *United States*, 136 U. S., 1. It will be noticed that Congress did not attempt to exempt any part of the right of way which should be located within a state, whether upon public lands or not. Evidently it was considered that, in respect to the state through which the railroad should be built, the right of way, including the superstructure and other property, ought to be subject to the taxing power of the state in which it should be located, that being one of the sovereign and necessary powers inherent in and possessed by the state. A different rule was intended with reference to the territories, over which Congress itself had exclusive control. The language should then be construed according to its natural signification, as it does not take from the territory any inherent power which it possessed.

Again, the right of way exempt within the territories is spoken of as an entirety. Congress could not have intended to exempt merely the right of way located over the public domain, and which was granted by section 2,

when that also, as determined by this court, included the superstructure placed thereon, and at the same time have intended to subject to taxation by the territories, say, half an acre or so between exempted portions, which right of way over such half-acre might have been acquired by purchase or condemnation. To subject such a small strip to the taxing power of the territory would be to authorize the territory to sell such small portion in case of failure to pay taxes thereon, and thereby destroy or disintegrate the railroad in case of such failure; for the power to tax implies the power to destroy.

McCulloch v. *Bank of Maryland*, 4 Wheat., 427.

But it is contended that to permit our construction would be to take out of the taxing or legislative power of the territory property which had theretofore been taxable. This reasoning is not sound, because it must be admitted that the mere strip of land used as right of way is of insignificant value, especially in the territories, and the main value would consist in the superstructure placed thereon by the railroad company. Now, if this court was right in the construction given to the meaning of the right of way as embracing the superstructure, Congress did withdraw from the taxing power of the territory such property of the railroad company as was used in the superstructure upon the right of way located upon the public domain.

Again, the strip of land acquired for use as right of way by the railroad company was not acquired solely for its own purposes, but was acquired in order that it might be used as a post route and military road by the government when necessary. (See section eleven of the act.)

Could it be possible that Congress, which had the supreme power over the territories, intended, when making the exemption from taxation of the right of way, that only a portion of the right of way within the territories should be exempt? In view of the interest in or right to use this road or highway which Congress had secured by section eleven in favor of the United States, it is manifest that Congress meant what it said—that is, the entire right of way within the territories should be exempted from taxation. This is but the ordinary construction to be given to the language used. In view of the great purpose sought to be accomplished and the interest which the government was to have, and the use which it might make of the railroad, this is a case in which a strained construction of language should not be resorted to for the purpose of defeating an immunity. Particularly must this be so as against the contention and the right sought to be exercised, not by Congress, but by one of the territories. In support of this we simply refer to the argument, reasons and authorities in our brief heretofore filed, in respect to the rules of construction applicable to this case.

The words "right of way" in the exemption clause are certainly broad enough to cover everything that would be, in fact or in law, "right of way," unless there is something in the act, section or clause to limit the words to some particular portion of such "right of way," which, as it seems to us, cannot be successfully claimed by anyone.

FIFTH POINT.

Congress intended to make a contract that the right of way in the territories of the United States should be exempt from taxation by the territories, and also exempt from the passage of any act by Congress to tax the same for the benefit of such territories.

Congress knew at the time of the passage of the act that it could, at any time, by its own enactment, tax any property in any of the territories, for the benefit of such territories, and could do this regardless of the revenue laws that the legislatures of such territories might pass. Therefore, to make this exemption of the right of way from taxation of any value, Congress created it by such terms as not only to prohibit the territories themselves from taxing the right of way, but also to prohibit any future Congress from exercising the right of taxation against such right of way for the benefit of the territories or any of them. The making of the contract for exemption from taxation so as to prevent Congress itself, as well as the territories, from taxing, discloses the thought on the part of Congress of making this exemption a thing of more value than the mere exemption of an unimportant strip of land 200 feet in width through these territories.

We have had no opportunity to see the brief prepared by counsel for the Territory under the order of this court of March 6th, and therefore are unable specifically to answer the arguments it may contain.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellees.

E. D. KENNA,
ROBERT DUNLAP,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, *A. D.*, 1898,

THE TERRITORY OF NEW MEXICO, Appellant, vs. THE UNITED STATES TRUST COMPANY OF NEW YORK, and C. W. SMITH, Receiver of the property of the Atlantic and Pacific Railroad Company, Appellees.	No. 169.

ADDITIONAL BRIEF AND ARGUMENT OF APPELLEE, UNITED STATES TRUST COMPANY, UNDER THE ORDER GRANTING REHEARING.

STATEMENT.

Since filing our brief, under the order made, authorizing the filing of the petition for rehearing, we have received a copy of the brief of appellant, and since the court has granted the rehearing, to be had upon briefs filed, and such additional ones as the parties may choose to file by May 1st, 1899, we respectfully submit the following brief and arguments in addition and supplemental to our former brief.

FIRST POINT.

The intervening petition on pages 30 to 32 of the transcript, and the assessments upon which it is based, on pages 80 to 85 of the transcript, fail to show any valid assessment or levy of taxes upon a valid assessment, which were, or are, any lien on, or charge against, the property or funds in the custody of the receiver in the foreclosure suit commenced by the United States Trust Company against the Atlantic & Pacific Railroad Company, and in which the receiver was appointed on the 10th day of January, 1896.

I.

Counsel for the territory in his brief, discloses that he finds himself in a very embarrassing position concerning the question of the character of the estate obtained by the railroad company, on lands held in private ownership, through the provisions of the 7th section of the act of July 27th, 1866. He admits that under the decision already made in the other cases the "right of way" granted by the second section of the act, created in the railroad company an estate of some character, which at once absorbed into itself the permanent fixtures placed upon such estate, for the purpose of building the railroad thereon.

Under such an admission, the argument of counsel is necesarily based on the proposition, that the "right of way" acquired by the railroad company under the provisions of the seventh section of the act, *is of an entirely different character from that which the company acquired through the grant in the second section of the act.*

If we are right, as to the position of counsel, *it must be conceded* that the estate which the company acquired under the provisions of the seventh section, would not be of an *inferior* character to

that which counsel characterizes as "the unnamed amorphous estate of corporeal quality" [see bottom of page 13 of counsel's brief], acquired by the company under the second section of the act.

Counsel very conclusively argues on pages 12 to 15 of his brief, that the estate the company acquired under the seventh section, was an estate in fee simple, or an estate at least greater than the estate acquired by the grant in the second section.

It necessarily follows, that if the estate acquired for "right of way" under the seventh section is not inferior in character to the estate acquired by the grant under the second section of the act that this court has definitely and conclusively settled, in the decision made in the Bernalillo case, that the superstructure placed upon such estate to make a railroad, instantly became upon its affixture to the land, a part of the estate acquired and owned by the company. If this be true, it follows that each of the assessments upon which the intervening petition is based were illegal, void and unwarranted under the revenue laws of the territory of New Mexico, in that under such laws, no power or authority, is given to separate fixtures that are part of the real estate from the real estate itself, for the purpose of assessment and taxation [see sections 4019, 4044, 4045, 4056 and 4073 of the statutes of New Mexico, set out on pages 16 and 19 of our preceding brief]. If the property attempted to be assessed was part of the real estate to which it was attached, and which was owned by the company, how could it be sold under the provisions of section 4073, and the subsequent provisions of the statute, for the sale of real estate, which are 4074 to 4102, inclusive, and which, in substance, provides for giving notice of the sale, the sale at public auction, execution of certificates, redemption, execution of deeds, etc.

In such a case as the one at bar, the collector to sell the property on which the taxes were levied, would have to sell a horizontal strip embracing simply the actual things named in the

assessment, and upon which the assessment was made, leaving the actual real estate 200 feet in width, to which the property assessed was attached, unsold.

II.

Each of the assessments in controversy are violative of the provisions of subdivision "Third" of section 4019 [former brief, pages 16 and 17] which requires real estate to be described by legal subdivisions, *or by such other description as will identify it.* The only description in any one of these assessments is of the superstructure placed upon 60.7 miles of the right of way [in a total mileage of 93.7 miles in Valencia County] which runs over land "*which was held in private ownership at the time of the grant of said right-of-way to said railroad company.*"

This assessment shows that there was 93.7 miles of right-of-way in Valencia county, and inferentially that 60.7 miles of this was acquired under the seventh section of the act, and that 33 miles was acquired under the second section of the act, without showing by any further description or statement where this 60.7 miles was located with reference to the entire mileage. As this was an assessment of real estate, and had to comply with the statutes, in order to be valid, so that the real estate itself might be sold, we desire to ask this court if it can uphold such an assessment in view of its previous decision in French *v.* Edwards, 13 Wal., 506; Lyon *v.* Alley, 130 U. S., 177; Bird *v.* Ben Lisa, 142 U. S., 664;

See, also,

Lewis *v.* Eastford, 44 Conn., 477;
Thibodaux *v.* Keller, 29 La. Ann., 508;
Green *v.* Walker, 63 Me., 311;
Jefferson *v.* Whipple, 71 Mo., 519;
Wilkins *v.* Tourtellott, 28 Kas., 589;
Greenough *v.* Fulton Coal Co., 74 Pa. St., 486;
Dane *v.* Glennon, 72 Ala., 160;
Salisbury *v.* Shirley, 66 Cal., 223;
State *v.* Franklin, 46 N. J. L., 437;
Sanford *v.* People, 102 Ills., 374.

SECOND POINT.

The intervening petition wholly fails to state a single fact which entitles the territory to collect out of the funds in the hands of the court the taxes sought to be collected on any, or all, of the assessments upon which such intervening petition is based.

Section 4025 and 4026, compiled laws of New Mexico, 1897, [which were in force at the time of these assessments] reads as follows:

§ 4025. "The property of every firm and corporation must be assessed in the county where the property is situated, and in the name of the firm or corporation. Such firm or corporation shall pay tax, and may charge the same to its partners or stockholders, according to their respective share. The owner or holder of stock in any firm or corporation, the entire capital or property of which is assessed, must not be assessed individually for such stock."

§ 4026. "All taxable property shall be listed, assessed and taxed each year, in the name of the owner thereof, on the first day of March."

If there was a compliance with the sections above quoted in the assessment made, such assessment discloses that the property assessed was the property of the Atlantic and Pacific Railroad Company, and if the assessments were properly made of the superstructure separate and apart from the real estate, to which the same was attached, it was, and is because of the correctness of the theory of counsel for appellant, that such property was personal property. The assessment and levy of taxes on personal property of the Atlantic and Pacific Railroad Company for the years preceding the year 1896, would give no claim or right against the receiver, or the trust company to have such taxes paid out of the funds in the custody of the court under the foreclosure proceedings, as the receiver was appointed and took possession of the property under the foreclosure in which the intervention was had, on the 1st day of February, 1896. [Transcript, page 26.]

THIRD POINT.

The right of way and its superstructure acquired by the Atlantic and Pacific Railroad Company under the seventh section, was exempt from taxation in the territory of New Mexico by the provisions of the exemption contained in section two of the act approved July 27th, 1866.

I.

In support of this point we not only refer to the arguments presented on pages 20 to 27, inclusive, of our former brief, filed in this case, and insist that they fully dispose of this question, but also desire to suggest to the court the utter impractibility of any proposition which would hold that *only* the land granted by the government in the second section of the act for "right of way" is exempt under the exemption clause in said section. This act was approved July 27th, 1866, and took effect at once so far as the right of way was concerned. This grant of right of way in the second section *operated upon all lands to which the government had not actually parted with the title.*

Railroad Co. *v.* Alling, 99 U. S., 463;

Railroad Co. *v.* Baldwin, 103 U. S., 428;

Bybee *v.* O. & C. R. R. Co., 139 U. S., 663;

Noble *v.* Union River Logging Co., 147 U. S., 165.

Now suppose, as is actually the fact in the case at bar, that the builders of this railroad from Albuquerque to the west line of the territory assumed that the entire line of "right of way" was acquired through the grant in the second section, on account of all lands over which the right of way was located being public lands, and assume further that no proceedings were ever had under section seven of the act, but that all land was actually acquired through the grant in the second section, or by virtue of the statute of limitations, how would any assessor be able to make an intelligent assessment of any portion of this "right of

way" under the assumption that the portion of the "right of way" acquired by the bar of the statute of limitations, was not exempt from taxation by the exemption in the act? While it does not appear from the record, it is a fact that all of the "right of way" in Valencia county was either acquired through the grant in the second section, or by virtue of the bar of the statute of limitations.

II.

The phrase in the second section "the right of way shall be exempt from taxation *within the territories* of the United States", surely includes all "right of way" in any territory, however acquired. "Right of way" in any territory acquired under the seventh section of the act, whatever its character may be, is certainly nothing but "right of way" within such territory, and therefore falls within the express terms of the exemption clause.

We desire the court to carefully consider our former brief filed in this case, as we attempted there to show very many reasons why the decision rendered in the courts below in this case ought to be confirmed, and hence have not attempted to restate those arguments in this brief, except as to one of them.

CONCLUSION.

If the property assessed was real estate, as this court has determined it was, in the Bernalillo county case, then no valid assessment was ever made under the taxing laws of New Mexico. If the property assessed was personal property, then no right to demand payment for the taxes levied upon the assessment of it out of the funds in the custody of the court has been disclosed at least for the years preceeding 1896.

In any event, and under any circumstances, it must be apparent that the entire "right of way" through Valencia county, was exempt and that such exemption, exempted the entire superstructure from taxation.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellees.

E. D. KENNA,
ROBERT DUNLAP,
Of Counsel.

NEW MEXICO *v.* UNITED STATES TRUST COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 169. Resubmitted April 17, 1899. — Decided May 15, 1899.

The provision in the act of July 27, 1866, c. 278, exempting from taxation the right of way granted to the Atlantic and Pacific Railroad Company, does not operate to exempt the right of way when acquired from private owners and not from the United States; and the judgment in this case made at this term and reported on page 186 of 172 U. S., having been made under a mistake of facts, is modified to that extent.

The assessments on the superstructures, on so much of the right of way as was taxable, were not assessments of personal property, but were clearly assessments of real estate; and the fact that the improvements were designated by name, and some of them given a separate valuation, did not invalidate their assessment as real estate.

THE statement of the case will be found in the opinion of the court.

Mr. F. W. Clancy for appellant.

Mr. C. N. Sterry, *Mr. E. D. Kenna* and *Mr. Robert Dunlap* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

1. This case was submitted with No. 106, which was between the same parties, and on the authority of the opinion in that case the judgment of the Supreme Court of the Territory was affirmed. 172 U. S. 171, 186.

The cases were argued together, and it was supposed involved identically the same questions dependent upon a statement of facts which were stipulated. No distinction between the cases

was indicated in the oral argument, and a reference of a few lines in a brief of thirty-five pages was overlooked.

In the petition for rehearing our attention was called to the fact that there is a substantial difference between the matters involved in this cause and those arising in No. 106. The difference is this: In 106 the right of way was in Bernalillo County through land which was public domain, whilst in this case the right of way is in Valencia County across the public domain for 33 miles only, and for 66.7 miles over land which was held in private ownership at the time of the grant to the railroad by the act of 1866. In other words, the railroad company derived its right of way for 33 miles in Valencia County under section 2 of the act of July 27, 1866, and to 66.7 miles under the power conferred by section 7 of said act. This difference was not adverted to in No. 106, and we will now consider the effect of it. In the opinion in 106 we said:

"The right of way is granted to the extent of two hundred feet on each side of the railroad, including necessary grounds for station buildings, workshops, etc. What, then, is meant by the phrase, 'the right of way'? A mere right of passage, says appellant. *Per contra*, appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was granted, that all that was attached to it became part of it and partook of its exemption from taxation.

"To support its contention appellant urges the technical meaning of the phrase, 'right of way,' and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context, and the intention of the legislature otherwise indicated. Examining the statute we find that whatever is granted is exactly measured as a physical thing, not as an abstract right. It is to be two hundred feet wide and to be carefully broadened, so as to include grounds for the superstructures indispensable to the railroad."

After further consideration of what was granted, we also said: "The interest granted by the statute to the Atlantic and Pacific Railroad Company therefore is real estate of corporeal quality, and the principles of such apply. One of these, and

an elemental one, is that whatever is erected upon it becomes part of it." And we concluded that not only the right of way was exempt, but all its superstructures were exempt. But our conclusion was expressly based on the terms of the statute, and we took care to affirm the rule of construction which had been announced many times and in many ways, that the taxing power of the State is never presumed to be relinquished unless the intention be expressed in terms too clear to be mistaken. If a doubt arise as to the intention of the legislature, that doubt must be solved against exemption from taxation.

Applying this rule to the act of July 27, 1866, c. 278, the exemption from taxation must be confined to the right of way granted by the United States by section 2 of the act, and to the superstructures which become a part of it, and not to the right of way which the railroad company may have acquired under section 7, or independently of that section. Section 1 creates the corporation and authorizes it to construct and maintain a continuous railroad and telegraph line from and to certain points, and invests the company with the powers, privileges and immunities necessary to effect that purpose. Section 2 provides: "That *the right of way* through the public lands be, and the same is hereby granted, to the said Atlantic and Pacific Railroad Company . . . for the construction of a railroad and telegraph line as proposed. . . . Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the *public* domain, . . . and *the right of way* shall be exempt from taxation within the Territories of the United States." 14 Stat. 292.

The right of way which is granted and the right of way which is exempt from taxation is precisely identified by the natural and first meaning of the words used and their relations. It would require an exercise of construction to extend the exemption, and even if there are reasons for it, there are certainly reasons against it, and in such conflict the rule requires that the latter shall prevail.

2. It is contended by the appellee that the assessment was invalid because the laws of the Territory required the assess-

ment of the right of way and its superstructures to be made as an entirety.

The contention is technical. It is not complained that the valuation of the superstructures was excessive, but that they were assessed as personal property, and hence invalidly assessed, because by the laws of the Territory the term "real estate" includes lands to which title has been acquired and improvements, and the term "improvements" includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired or not.

The record does not afford the means of judging of the contention as clearly as might be wished, but we think it is not tenable.

The intervening petition, which is the basis of the proceedings, proceeds upon the ground that omissions were made in assessments of property to the railroad company for a series of years beginning with the year 1892 and ending with 1896, and that additions were made of said property under the laws of the Territory for said years. The valuation of the property and the taxes levied against it are stated, and a description of the property is attached.

It is alleged that the receiver of the company refuses payment because he claims that the property is exempt from taxation under the act of July, 1866; but it is also alleged "that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad where it may pass through the public domain, and does not extend to any improvements made upon the right of way, nor to the said right of way itself where it passes through land not included in the public domain."

It is prayed that "the said taxes, so levied as aforesaid," be declared a lien on the property in the hands of the receiver, and that he be ordered "to pay the said taxes." General relief is also prayed.

To the petition of intervention the receiver submitted pleas respectively to the claim of taxes for each of the years. The pleas were substantially alike, and alleged the assessment of the company's property for each of the years, with a descrip-

tion or designation of it, the value at which it was assessed, and the taxes levied against it and the amounts of taxes paid by the company.

In the first plea it is alleged that the company through its officers made a return to the county assessor of its property situated in the county, and a copy of the return is attached and made part of the plea. Discriminating the property upon which the taxes were paid and that in the return of the company and assessed, the plea alleges:

"That the other property returned by the taxing officers of said railroad company for said year was and is the property upon which the taxes are paid as above stated, and as shown by Receiver's Exhibits 3 and 4.

"That the only pretended or claimed levy of taxes against any property of the Atlantic and Pacific Railroad Company for the said year, remaining unpaid, is that shown to have been extended and levied upon the 'right of way' of the Atlantic and Pacific Railroad Company, which was and is assessed at the lump sum of $327,103, upon the assessment roll for said year, together with the further sums placed in said assessment roll in the column headed 'Value of cattle,' opposite the words contained in the column in said assessment roll headed 'Name of property owners,' save and except as hereinafter stated.

"The names and sums referred to are as follows:

Rio Puerco, 1st	$1888 00
El Rito, 3d	541 00
Laguna, 4th	677 00
Cubero, 6th	2145 00
McCarty's, 7th	682 00
Grants, 8th	1383 00
Blue Water, 9th	3150 00
San Jose, 2d	1316 00

"All of which is shown by the said assessment and levy of taxes upon said assessment roll, as will fully appear by reference to said Receiver's Exhibits No. 1 and No. 2, and the indorsements thereon.

"That prior to the first day of January, 1894, the Atlantic and Pacific Railroad Company paid each and every item of taxes assessed and levied against it or its property in said Valencia County, Territory of New Mexico, save and except only that levied against the assessed value of its 'right of way,' and that levied against the figures set opposite the names of the stations as hereinabove set forth and described."

The right of way, therefore, was assessed in 1892, and whatever taxes were due on it or any part of it were left delinquent.

As to the other years the record is not much less definite. It appears that the right of way was assessed and the taxes levied against it were not paid. In all the pleas there is a careful allegation of payment of the taxes which were conceded to be valid, and as careful a one that the company refused "to pay the balance of the taxes because of the fact that the assessment as made by the assessor was an assessment of the right of way and station grounds of the Atlantic and Pacific Railroad, which were and are exempt under the act of Congress creating said railroad company." It is manifest that the right of way was assessed and the taxes were delinquent. In what manner were the additional assessments made? It is shown in the exhibit to the intervening petition. We select the assessment for 1892. The assessments for the other years are the same, the amounts only being different to a small extent.

"The following was omitted in the assessment of the year 1892, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued and assessed by the collector:

The cross ties, rails, fish plates, bolts, spikes, bridges, culverts, telegraph line and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia, and constituting 'improvements' upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6500 per mile..... $214,500

Also the cross ties, rails, fish plates, bolts, spikes, bridges, culverts, telegraph line and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia, and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6500 per mile..... $394,550

Station houses, depots, switches, water tanks and all other improvements at Rio Puerco station.....	$1,800
Station houses, depots, switches, water tanks and all other improvements at San Jose station.....	540
Station houses, depots, switches, water tanks and all other improvements at El Rito station.....	600
Station houses, depots, switches, water tanks and all other improvements at La Guna station.....	2,100
Station houses, depots, switches, water tanks and all other improvements at Cubero station.....	600
Station houses, depots, switches, water tanks and all other improvements at McCarty's station.....	1,300
Station houses, depots, switches, water tanks and all other improvements at Grant's station.....	3,100
Station houses, depots, switches, water tanks and all other improvements at Blue Water station.....	1,300
	$11,340"

The assessments were not, as contended by appellee, of personal property. They were clearly of real estate, and because the improvements were designated by name and some of them given a separate valuation, did not invalidate their assessment as real estate. It was mere description, which did not change the essential or legal character of the superstructures.

It follows from these views that —

The judgment of the Supreme Court of the Territory must be reversed and the cause remanded for further proceedings in accordance with this opinion.